

ARTICLES

EXPEDITING IMPEACHMENT: REMOVING ARTICLE III FEDERAL JUDGES AFTER CRIMINAL CONVICTION

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I. INTRODUCTION	158
II. THE PROBLEM	162
A. <i>The Resource Allocation Problem in the Current System</i>	165
B. <i>The Jurisprudential Problem with the Current System</i> .	166
C. <i>Summary of the Problem</i>	168
III. THE SOLUTION	169
A. <i>A Two Track System</i>	169
B. <i>Expediting the Process: The Details</i>	173
C. <i>Automating the Impeachment Process in the House</i> ...	175
D. <i>Limiting the Issues Presented in the Senate</i>	179
E. <i>The Procedural Model Used in the Senate</i>	181
F. <i>Applying this Proposal to Past Impeachments</i>	183
IV. DEFENSES AND POSSIBLE CRITICISMS OF THIS PROPOSAL	189
A. <i>A Policy Defense of this Proposal</i>	189
B. <i>A Constitutional Defense of this Proposal</i>	194
C. <i>Possible Deficiencies and Criticisms of this Proposal</i> ...	198
D. <i>Trying Federal Judges in Federal Court Prior to Impeachment</i>	200
E. <i>Judicial Review in the Impeachment Context</i>	204
V. ALTERNATIVE POSSIBILITIES: A SURVEY OF COMPETING PROPOSALS	208

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A. Constitutional Amendment	209
B. Statutory Alternatives to Impeachment.....	212
C. Disciplining Judges: Statutory Reform.....	217
D. The National Commission on Judicial Discipline and Removal.....	218
VI. CONCLUSION	221

I. INTRODUCTION

The impeachment process for Article III federal judges is inconvenient, cumbersome, and costly. This article proposes revisions to render the process more efficient and effective in cases where there should be no reasonable disagreement as to the need for Senate review of the facts of the case. The article proposes that the House of Representatives, through the use of its internal rule-making power, establish a clear objective standard for automatic impeachment of federal district court and court of appeals judges who have been convicted of certain crimes in federal court.¹

Additionally, this article proposes that the Senate function on the model of an appellate court, rather than as a trial court, when trying judges who have been impeached. This will allow the Senate to limit the actual trial to a review of written briefs and a short oral argument before the entire Senate. Such an appellate-like function will also enable the Senate to employ the judicial doctrines of collateral estoppel, issue preclusion, and law-of-the-case.² Thus, the issue before the Senate would be limited to the single question of whether the offense for which the judge was convicted, and the facts surrounding the conviction, merit removal from office.

The text of the Constitution provides only one means of removing federal judges, who otherwise have tenure for life: impeachment. Rooted in old English precedents, impeachment under the Constitution requires that the House of Representatives indict and then prosecute an accused judge, and that the Senate sit as judge and jury to decide guilt or innocence.³ As

1. The precise standard will be explained *infra* Section III.

2. These doctrines could be used even in trial court. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 85 (1982). However, the appellate model of reviewing the record and short oral argument seems far preferable.

3. Article I of the Constitution bifurcates the impeachment power, giving the House of Representatives "the sole Power of Impeachment" while reserving to the Senate "the sole Power to try all Impeachments." See U.S. CONST., art. I, § 2, cl. 5 ("The House of Repre-

employed in Seventeenth-Century England,⁴ the impeachment procedure brought to justice those who, because of their power or station, could not be reached through ordinary judicial mechanisms; it was in this capacity that impeachment came to be used as one means of removing judges and other high officials from their posts. With this history in mind, the Framers incorporated impeachment into the Constitution.

In large part because of the importance and position of those subject to the impeachment process, the process is slow and unwieldy. Enormous time and energy, as well as great expense, are devoted to ensuring a fair hearing for the accused. This is nevertheless appropriate, because the removal of a high official from a lifetime post has historically been an act of some political moment, surrounded by sufficient controversy that the attention of both the House and the Senate have been required to legitimize the resulting political upheaval.⁵

This has historically been the case, but it is so no longer. In recent years, the number of federal judges charged with serious crimes and judicial misconduct has increased dramatically. Three federal judges have been impeached since 1986,⁶ and two

sentatives shall chuse their Speaker and other Officers: and shall have the sole Power of Impeachment"); U.S. CONST., art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present").

The mechanism applies to impeachment of both federal judges and officers of the Executive Branch. While the expedited process could also be used for Executive officials, it is not necessary to require this. Custom, practice, and frequently statute require that these officials, who serve at the President's discretion, resign upon indictment or conviction. But the proposal might be applied to judicial appointees formally classified as Article I appointments, such as bankruptcy judges and magistrates, who in fact work closely with Article III judges.

4. See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 880-83 (1930).

5. Eleanore Bushnell has stated that "[h]owever deeply Congress feels about the need to modify the procedure for evaluating federal judges, my analysis of constitutional stipulations on the subject, particularly the Framers' careful provision for an independent judiciary, leads me to conclude that Congress must retain its sole power to impeach and remove judges." ELEANORE BUSHNELL, *CRIMES, FOLLIES, MISFORTUNES—THE FEDERAL IMPEACHMENT TRIALS* 9-10 (1992).

6. Harry S. Claiborne, U.S. District Judge for the District of Nevada, was convicted of tax evasion in 1984 and impeached in 1986. Alcee L. Hastings, U.S. District Judge for the Southern District of Florida, was impeached in 1989. Hastings' case is particularly interesting for two reasons. First, he was acquitted in criminal court of conspiring to solicit and accept a bribe; second, he was recently seated as a U.S. Representative from Florida.

The third federal judge to be impeached since 1986 is Walter Nixon, Chief Judge of the U.S. District Court for the Southern District of Mississippi. Nixon was convicted in 1987 on two counts of making false statements before a federal grand jury and was sentenced to prison. He refused to resign his office and continued to collect his salary until he was impeached in 1989. Nixon appealed his impeachment on the grounds that the Senate

more may well face impeachment.⁷ In addition, at least one federal judge is under active criminal investigation and has recused himself from cases involving the government.⁸ While this recent flurry of impeachments seems unusual, in fact it is surprising that there have not been more impeachments. "This nation cannot be so blessed as to have produced only about sixty serious malefactors."⁹

Indeed, even the necessity for elaborate impeachments of district court and court of appeals judges is unclear. In the two hundred-year history of the United States, there have been seventeen cases of impeachment at the federal level, including a President,¹⁰ a Senator,¹¹ a Supreme Court Justice,¹² one Cabinet member,¹³ one member of the circuit court of appeals,¹⁴ and ten district court judges.¹⁵ A review of the impeachment of federal

committee used to receive evidence and take testimony in his impeachment violated the constitutional grant of authority to the Senate to "try" all impeachments. The Supreme Court recently held that Nixon's claim was non-justiciable on the ground that it presented a political question. *Nixon v. United States*, 113 S. Ct. 732, (1993). See *infra* note 44 for a full discussion of the Court's holding in *Nixon*.

7. Two federal judges were recently convicted of crimes: Robert Aguilar of California and Robert Collins of Louisiana. Judge Aguilar is awaiting resentencing, see *U.S. v. Aguilar*, 994 F.2d 609 (9th Cir. 1993), and Judge Collins is currently in prison, see *U.S. v. Collins*, 972 F.2d 1385 (5th Cir. 1993), *cert denied*, *Collins v. U.S.*, 113 S. Ct. 1812 (1993). On June 22, 1993, the Judicial Conference certified to the House of Representatives that Collins had engaged in impeachable conduct. Congress does not normally begin impeachment proceedings until the criminal proceedings have been resolved. Since Judge Aguilar's direct appeal has not yet been heard, no impeachment proceedings have begun.

8. See Tom Dubocq, *Federal Judge Faces Gift-Taking Probe*, MIAMI HERALD, Oct. 13, 1993, at B1.

9. BUSHNELL, *supra* note 5, at 10. The number sixty was computed by combining those impeached with those who voluntarily resigned in the face of alleged corruption.

10. Andrew Johnson is the only President to have been impeached. See DAVID M. DE WITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 1 (1903), cited with approval in John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 33 (1970). Historians condemn the attempt to remove Johnson, with near unanimity, as politically motivated and without any legal substance.

11. William Blount, Senator from Tennessee, was impeached for allegedly violating the United States' neutrality in a war between Britain and Spain by inciting two Indian tribes to invade and conquer certain Spanish possessions in Florida and Louisiana, and for employing various illegal means to further this conspiracy. See Feerick, *supra* note 10, at 26. The Senate dismissed the case for lack of jurisdiction. See 3 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES*, § 2318 (1907).

12. Justice Samuel Chase was impeached in 1805. He was acquitted on all charges. See Feerick, *supra* note 10, at 29 and *infra* at note 142.

13. William W. Belknap, President Grant's Secretary of War, was the subject of a House Ways and Means Committee investigation that revealed he had accepted money in exchange for an appointment to an Army post tradership. See Feerick, *supra* note 10, at 36-37. He was impeached, but soon resigned. *Id.*

14. Robert Archbald was a Third Circuit Court of Appeals judge when he was impeached in 1913. He was convicted and removed from office. See 6 CLARENCE CANNON, *CANNON'S PRECEDENTS* 512 at 707-08 (1935).

15. See BUSHNELL, *supra* note 5, at 9-10.

district and court of appeals judges clearly indicates that the impeachments that have led to removal have almost always resulted from what could be categorized as indisputable acts of misconduct—that is, acts that all reasonable people would agree merit impeachment.¹⁶ Indeed:

An analysis of the major charges against the [judges] puts financial greed and abuse of office in primary positions The same flaws also characterized, variously, the officers who escaped impeachment or trial by resigning. To quote Edward Gibbon, each official who came to trial fitted one or more of these categories: “crimes, follies, and misfortunes.”¹⁷

In fact, in the Senate’s opinion, all of the federal judges successfully impeached, convicted, and removed from office were engaged in criminally prohibited activity.¹⁸ This article posits that these judges could have been (and should have been) first tried in federal court by a jury of their peers, and then, if criminally convicted, summarily impeached. There have been no successful removals for purely political reasons. Thus, the history of impeachment and successful conviction indicates that proven guilt is the primary requirement for successful removal.¹⁹

Thus, this article proposes that judges who are convicted (and whose conviction is affirmed on appeal) should be impeached

16. Of the twelve judges who have been impeached, seven were convicted. They were: John Pickering, who was removed in 1804 for, *inter alia*, appearing on the bench drunk and using profanity there, see 3 ANNALS OF CONG. 328-29 (1803); West H. Humphreys, who was removed in 1862 for treasonous conduct (namely, he advocated the right to secession, incited revolt, and unlawfully acted as a judge of the Confederate District Court), see Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: a Historical Overview*, 49 N.C. L. REV. 87, 102 (1970), citing ALEXANDER SIMPSON, A TREATISE ON FEDERAL IMPEACHMENT 197-99 (1916); Robert W. Archbald, who allegedly influenced litigants to enter into business transactions for his personal gain and was impeached and eventually removed in 1913, see CANNON’S PRECEDENTS, *supra* note 14, at 707 (1935); Halstead L. Ritter, who was removed after being accused of tax evasion for having brought disrespect to his court, see Feerick, *supra* note 10, at 46; Harry S. Claiborne, who was impeached and convicted in 1986 after having been criminally convicted of tax evasion, see 132 CONG. REC. S15759-03 (1986); Alcee L. Hastings, who was removed for perjury and soliciting and accepting a bribe, see 135 CONG. REC. S13782-01 (1989); Walter Nixon, who had been previously convicted in federal court of perjury and bribery in connection with cases pending in his court, see 135 CONG. REC. D467-01 (1989), 135 CONG. REC. S14633-02 (1989).

17. Thompson & Pollitt, *supra* note 16, at 102.

18. See *supra* note 16 and authority cited therein. Even Judge Alcee Hastings fits into this model. Mr. Hastings, now a Congressman from Florida in the House of Representatives, was charged with conspiring to solicit and accept a bribe and was acquitted after a jury trial. Hastings was nevertheless found guilty by the Senate of eight impeachable offenses, all revolving around bribery and perjury. See 135 CONG. REC., D467-01 (1989), 135 CONG. REC. S14633-02 (1989).

19. See generally *infra* Section III.F.

automatically by the House and be granted a limited trial in the Senate to litigate only the appropriateness of removal from the bench for the crimes committed. The classic impeachment process should remain available to Congress for political impeachments.

II. THE PROBLEM

The current process of judicial impeachment, a process used historically for both constitutional and housekeeping reasons, is the sole mechanism for removing federal judges.²⁰ With the recent increase in the number of impeachment proceedings, a broad range of observers have noted that the current process of impeachment needs reform.²¹

20. When the arduous impeachment route is followed, whether for a jurist or for an officer of the executive branch, the procedure by which it is initiated and conducted begins, as noted, with a complaint directed to the House of Representatives; that body then undertakes an investigation of the official complained of. Investigations of the first three impeached officers were made by select committees. All investigations have been referred to the House Judiciary Committee since it was created in 1813.

BUSHNELL, *supra* note 5, at 21. However, "When the Judiciary Committee failed to secure House approval for impeaching Andrew Johnson, the House assigned the task to the Reconstruction Committee, which succeeded in gaining adoption of a resolution to impeach the president." *Id.* at 329, n.8.

21. Many scholars have written on this subject. *See, e.g.*, Stephen B. Burbank, *Alternative Career Resolution: an Essay on the Removal of Federal Judges*, 76 KY. L. J. 643 (1987-88) (Constitution should not be amended unless absolutely necessary); Bradley C. Cannon, *Comments on Professor Burbank's Essay*, 76 KY. L. J. 701 (1987-88) (amendment necessary for any meaningful change; this will not affect judicial independence or integrity of the Constitution); Brendan C. Fox, *Impeachment: The Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. WASH. L. REV. 1275 (1992) (federal courts alone must have power to define such constitutional terms as "try" or Congress will consequently have unconstitutional control over the judiciary); Jon J. Gallo, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 UCLA L. REV. 1385 (1966) (judicial tribunals should remove judges no longer acting "during good behavior"); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989) (impeachment is an essentially political process); Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209 (1991) (narrowing the issues for trial and delegation of fact-finding authority); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969) (impeachment is the only constitutional route); Daniel Luchsinger, *Committee Impeachment Trials: The Best Solution?*, 80 GEO. L. J. 163 (1991) (use of trial committees is unconstitutional; the committee should make the initial determination of guilt or innocence); Merrill E. Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 KAN. CY. L. REV. 1 (1938) (judicial independence of utmost importance; impeachment is the only constitutional means of removal); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485 (1930) (inferior federal judges should be appointed and removed by the judiciary); John P. Stevens, *Reflections on the Removal of Sitting Judges*, 13 STETSON L. REV. 215 (1984) (the manner in which judges are appointed and removed subtly affects the quality of their work); Martha A. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135 (1969) (impeachment

That the current system is deficient is beyond dispute. It is extremely cumbersome and slow, and it poses major ethical problems. These difficulties arise partly because the original process was designed to superintend a much smaller judiciary whose nominees were subject to a higher level of scrutiny during the confirmation process. In 1790, there were nineteen Article III judges²² and nearly one hundred Representatives and Senators.²³ By 1885, there were still fewer than one hundred federal judges.²⁴ Today, there are almost eight hundred and fifty federal judges with life tenure, and the number could pass 1,000 within the decade,²⁵ compared with five hundred and thirty-five voting members of the House and Senate.²⁶ As these numbers demonstrate, supervising the judiciary became a more significant task for Congress. Further, this task has expanded from the political arena into the simple “housekeeping” tasks necessary to ensure the integrity of the bench. While housekeeping always formed part of Congress’s role, it has now become the major focus—perhaps, in reality, the only task. Indeed, Congress acknowledged the existence of a problem with its establishment of the “National Commission on Judicial Discipline and Removal.”²⁷ The Commission’s mandate was:

- (1) to investigate and study the problems and issues involved in tenure (including discipline and removal) of an Article III judge;

the sole means of removal for federal judges); Howell T. Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123 (Aug.-Sept. 1987) (favors constitutional amendment for judicial removal).

22. The Judiciary Act of 1789, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.), established a judicial system composed of a Supreme Court with a chief justice and five associate justices and thirteen district courts, each presided over by one district judge. Three circuit courts were created, but no circuit court judges were designated. Each circuit court was comprised of two of the Supreme Court Justices and a district court judge.

23. The First Congress included twenty-six Senators and sixty-five Representatives. See CONG. Q., CONGRESS A TO Z 187 (1988).

24. See REPORT OF THE NATIONAL COMMISSION OF JUDICIAL DISCIPLINE AND REMOVAL ii, on file with the HARVARD JOURNAL OF LAW AND PUBLIC POLICY (1993) [hereinafter KASTENMEIER REPORT]. The Chairman of the Commission was former Representative Robert Kastenmeier. The Commission report was issued on August 2, 1993.

25. *Id.* at iv.

26. Congress itself determines the number of Members in the House. The size of the House increased along with the population of the country throughout the nineteenth century. In 1910 the size of the House was set at 435, and it has remained at that number ever since. See CONG. Q., *supra* note 22, at 405.

27. See Terry Hackett, *National Commission on Judicial Discipline and Removal to Begin Work*, 75 JUDICATURE 223 (1992) and 136 CONG. REC. H3108-01 (1990) (establishing the Commission).

(2) to evaluate the advisability of proposing alternatives to current arrangements with respect to such problems and issues, including alternatives for discipline or removal of judges that would require amendment to the Constitution.²⁸

The Commission was created for precisely the reasons discussed above.²⁹

The trial of Judge Harry E. Claiborne, District Judge for the District of Nevada, illustrates the failings of the current impeachment process. Judge Claiborne had been convicted of tax fraud and sentenced to two years in federal prison. At the time of his impeachment and conviction, he was still serving his sentence. Notwithstanding the conviction in federal court, the affirmance of that conviction on appeal, the denial of *certiorari* by the Supreme Court, and numerous futile collateral attacks on the conviction,³⁰ both the House and the Senate granted a *de novo* hearing on the substantive question whether he committed the acts that resulted in his conviction.³¹ It was no surprise that, after a massive, time-consuming, and expensive attempt to review the evidence, Congress came to the same conclusion as did the jury and numerous federal judges:³² Judge Claiborne had committed tax fraud and was guilty of the offenses charged.³³ The Senate

28. See CONG. REC., *supra* note 19.

29. Hackett, *supra* note 27, at 223 summarizes the need for the Commission as follows:

The current process of removing a federal judge is a lengthy one, involving an investigation by the House of Representatives and a trial by the Senate. Historically, the process has not been used very often. In fact, prior to 1986, only nine federal judges were impeached. But in the last five years, three judges have been removed by the Senate, and two more impeachments seem likely to occur. Because of this influx of cases, the Judicial Improvements Act of 1990 called for establishment of a National Commission of Judicial Discipline and Removal, which will study problems and issues involved in the discipline and removal of Article III judges.

See *infra* Section V.D., for a summary of the Commission's recommendations.

30. See *U.S. v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), *stay denied* 465 U.S. 1305 (1984), *cert. denied* 469 U.S. 829 (1984). See also *U.S. v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), *cert. denied* 475 U.S. 1120 (1986). Other collateral attacks on the conviction may be found at 781 F.2d 1325 (9th Cir. 1985); 781 F.2d 1327 (9th Cir. 1986); 781 F.2d 1334 (9th Cir. 1986); 790 F.2d 1355 (9th Cir. 1986); 870 F.2d 1463 (9th Cir. 1989).

31. Grimes, *supra* note 21, at 1231.

32. Trial Judge Walter Hoffman denied a pre-trial motion to dismiss. He was affirmed by Judges Floyd R. Gibson of the Eighth Circuit, Leonard I. Garth of the Third Circuit, and Cornelia G. Kennedy of the Sixth Circuit (all sitting by designation). *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), *stay denied*, 465 U.S. 1305 (1984). Given the number of federal judges who had heard the merits of the case against Judge Claiborne and found him guilty, it was very unlikely that the Senate would hear the same evidence and the same defense, and conclude otherwise. See also *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

33. See 132 Cong. Rec. 515759-03 (1986). Senator Paul Laxalt and many of his Nevada constituents called upon Judge Claiborne to resign rather than face impeachment pro-

voted to convict, and he was removed from office³⁴—the first judge so removed in more than fifty years.

A. *The Resource Allocation Problem in the Current System*

The amount of time and energy spent on the Claiborne impeachment alone is startling. In 1986, the year of the Senate trials, his impeachment was discussed 154 times, covering thousands of pages in the *Congressional Record*.³⁵ In addition, the cost of the investigation and trial was high.³⁶ Indeed, given the fact that a legislative year typically contains no more than 150 legislative work days, the fact that the full Senate spent nearly three legislative days³⁷ on the Claiborne impeachment reflects a significant failure of the current process. Because the Senate invoked Senate Rule XI,³⁸ whereby a twelve-member committee

ceedings in the Senate. Wallace Turner, *Jailed U.S. Judge Resists Resigning*, N.Y. TIMES, June 16, 1986, at A1. Aside from the savings and expense, many believed, including the LAS VEGAS REVIEW-JOURNAL, that an impeachment trial would reflect badly on Nevada. In an editorial the paper lamented, "That's all we need—a long, messy impeachment with Nevada exposed to the spotlight of national and international publicity." Turner, *supra*. But Claiborne's attorney, Oscar Goodman, steadfastly maintained Claiborne's innocence and stated that Claiborne would not resign "until he obtains vindication." Chris Chrystal, *Impeachment Considered for Convicted Judge*, UPI, April 29, 1986. Despite the considerable outrage at Claiborne continuing to draw his salary after a felony conviction, Goodman said that "[h]e was appointed for life, he served with distinction, working hard, and he will continue to accept his salary because he is entitled to it." Turner, *supra*.

34. See 132 CONG. REC. 15,759 (1986).

35. Westlaw database "CR" with search: Claiborne & impeach! & date (1986). By comparison, albeit an imperfect one, tax reform was mentioned 999 times in the Congressional Record of the same year. An examination of how Congress allocates its time and why is beyond the scope of this piece. However, it seems clear that significant Congressional resources are spent on impeachments.

36. The House investigations of Walter Nixon and Alcee Hastings, not including the time the House spent in voting the Articles of Impeachment, cost over \$850,000. 134 CONG. REC. E931-01 (1988).

37. Grimes, *supra* note 21, at 1224-45.

38. Senate Rule XI was adopted in 1935 in response to poor attendance at impeachment trials. The rule reads:

In the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of 12 Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials. Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine com-

hears testimony, takes evidence, and then reports to the full Senate, not one Senator heard, saw, or read all of the evidence, and a majority of Senators heard, saw, or read *none* of the evidence.³⁹ Accordingly, a number of Senators believed that they could not constitutionally vote to convict, as they had not functioned as a "Court" as mandated by the Constitution (notwithstanding their belief that Judge Claiborne was in fact guilty and deserved to be removed from office).⁴⁰ The impeachment trial in the committee of twelve Senators⁴¹ consumed eight full Senate legislative days.⁴² Those twelve Senators spent eleven legislative days out of 150 removing one judge from office; the Senate as a whole spent over two and a half percent of its legislative time that year⁴³ reaching a conclusion that was (in reality) preordained. This represents a significant mis-allocation of scarce congressional time.

B. *The Jurisprudential Problem with the Current System*

Besides the objection that this system of *de novo* review is inefficient, wasting valuable time and resources, there is also a compelling argument that the current impeachment process violates the guarantee of a fair trial.⁴⁴ Although all of the technical proce-

petency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

79 CONG. REC. 8,309 (1935).

39. Senator Heflin noted that at no point during the Committee presentation of evidence on the Senate floor during the trial did attendance by Senators exceed "the low sixties" of the 100 Senators. See KASTENMEIER REPORT, *supra* note 24, at 131.

40. See Linda Greenhouse, *After a Vote to Convict Qualms in the Senate*, N.Y. TIMES, Oct. 12, 1986, at D6.

41. Senate Rule XI provides that a committee of twelve Senators hear testimony in impeachment trials, and report later to the full Senate. See *supra* note 38 for the text of the Rule.

42. Grimes, *supra* note 21, at 1224.

43. There are approximately 15,000 Senate legislative days per session (150 days × 100 Senators). One hundred Senators spent three days and twelve spent eight days for a total of 396 Senate legislative days (300+ (8 Senators × 12 days) = 396). 396/15000 = 2.6%.

44. For example, in *Nixon v. United States*, 113 S. Ct. 732 (1993), petitioner Walter Nixon, a U.S. District Judge impeached in 1989, argued that the Senate's use of a committee to receive and take testimony pursuant to Senate Impeachment Rule XI was unconstitutional on the ground that it violated the requirement that the Senate "try" all impeachments. The Supreme Court unanimously held that this was a non-justiciable political question and thus did not reach the merits of Nixon's claim.

Although the majority opinion did not address the question of whether impeachment by committee violates the constitutional mandate that the Senate "try" impeachments, Justices Stevens and Souter did discuss the issue in their concurring opinions. Justice Stevens first acknowledged that "it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges." *Id.* at 741. He concluded that the

dures of indictment and trial are followed, the result is practically preordained.⁴⁵ Moreover, constitutional protections as they are understood in the criminal context are not provided. Finally, because the Senate frequently invokes Senate Rule XI⁴⁶—as it did in the Claiborne impeachment proceedings—only twelve Senators hear the evidence, yet all of the Senators act as jurors.⁴⁷

These fairness concerns have led some Senators to doubt the constitutionality of the existing process.⁴⁸ As Senator Heflin

textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say that the Senate's use of a factfinding committee under Rule XI is entirely compatible with the Constitution's command that the Senate 'try all impeachments.'

Id. at 746. Justice Souter gave a few (rather extreme) illustrations of when the Senate's impeachment procedures might be improper:

If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a 'bad guy,' [citation omitted] judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.

Id. at 748.

45. This is not to suggest that the proposed system would be *preferred* by judges who have been convicted. Indeed, in all likelihood convicted judges would prefer a slow, cumbersome, and not quite rational process over an expeditious one, as the latter would likely shorten their tenure of office considerably.

46. Senate Rule XI was adopted in 1935 in response to poor attendance at impeachment trials. See *supra* note 38 for the text of the rule.

47. Moreover, when the committee of twelve gives a summary report to the full Senate, typically only a portion of Senate is present. See, e.g., KASTENMEIER REPORT, *supra* note 24, at 131 (quoting Senator Heflin and noting that at no point during the presentation of evidence on the Senate floor in the Claiborne proceedings did attendance by Senators exceed "the low sixties").

48. For example,

Senator David Pryor, an Arkansas Democrat who voted to acquit Judge Claiborne, attributed the Senate's unwillingness to expand the trial to its desire to bring the congressional session to an end. 'If this were January 10, my guess is we would have a lot of witnesses,' he said.

Linda Greenhouse, *After a Vote to Convict Qualms in the Senate*, N.Y. TIMES, Oct. 12, 1986, at D6.

Senator Bingaman stated with regard to the impeachment of Judge Claiborne that if we do not go forward with a conviction in this case, we have the anomaly of leaving a Federal District Judge in office while he also . . . continues to be labeled a felon under the criminal laws of this country. To my mind, that is an unacceptable result in this particular case that has been presented.

132 CONG. REC. S15759-63 (1986). Neither situation is compatible with any valid image of trial court justice.

Senators were troubled by the abbreviated procedures used for Judge Claiborne's impeachment trial, and wondered aloud whether the process was fair, or even constitutional . . . Senator Daniel J. Evans, a Washington Republican who ultimately voted to acquit Judge Claiborne, said after the first vote that he found a written record an inadequate basis for reaching a conclusion on, as he phrased it, 'whether the judge is a consummate liar or whether he is being railroaded.'

notes, these objections may be easily formulated as constitutional objections to the Senate process and trial. He states that "our present system for removing federal judges runs dangerously close to violating their Fifth Amendment due process rights. This exacerbates the need for reform."⁴⁹ While *Nixon v. U.S.*⁵⁰ held that this issue was non-justiciable, this does not mean that Senators are not bound by constitutional standards. Rather, they must seek to adhere to standards they believe to be constitutional, as no judicial review of the conviction is possible.⁵¹

There is also another "jurisprudential" problem—the issue of public confidence in the judiciary. A system that allows a federal judge to retain his office after his criminal conviction⁴ has been affirmed creates significant doubts in the public's mind as to the integrity of the system.

C. Summary of the Problem

These two process failures—one of too much procedure and one of not enough substance to the procedure—highlight the basic problem.⁵² As the Claiborne case shows, the current system of impeachment—at least as it functions to remove federal judges who have already been criminally convicted—is inadequate. The impeachment process cannot work to police a large judiciary if it compels Congress to grant *de novo* hearings on issues already litigated and resolved.⁵³

Greenhouse, at D6.

49. See KASTENMEIER REPORT, *supra* note 24, at 131.

50. 113 S. Ct. 732 (1993).

51. In fact, Senators take an oath with specific reference to the impeachment process. See U.S. CONST., art. I, § 3. The Kastenmeier Report, *supra* note 24, at 11, states the obvious: "Senators and Representatives, of course, are as much bound by the Constitution as are the judges."

52. While at first glance one might think that these two criticisms contradict one another, they do not. The first alleges that there is a procedurally complex bureaucratic process for a problem that does not require such intense procedural protections. The second alleges that this procedurally complex process is not substantively fair.

53. The problem of removing errant judges is not unique to the federal system—each state has faced this problem as well. The states, as "laboratories of experimentation" for the federal system, have all chosen to create a mechanism for removing judges in addition to impeachment. See *New State Ice Company v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Note, *The Intercircuit Tribunal and a Perceived Intercircuit Conflict*, 62 N. Y. U. L. REV. 610 (1988). The states provide an excellent model to study the removal of clearly unworthy judges—an issue the states have confronted with a great deal more frequency than the federal government. States have developed several other mechanisms for removing judges beyond the traditional impeachment process. Most notably, as of 1986, all of the states and the District of Columbia had a system by which a judicial commission is created to investigate charges against judges and either to remove them or to present proposals for their removal to the highest court of the state. See Jeffrey Shaman,

The impeachment process can and should be streamlined for judges convicted in federal court of certain crimes. The House should be able to impeach based solely upon a prior criminal conviction in an Article III court, and the Senate should be able to convict once it has established that the commission of these crimes falls under the constitutional definition of "high crimes and misdemeanors" and does, therefore, merit impeachment. In the Claiborne trial, for example, there was little discussion of the substantive question of whether tax fraud is a crime worthy of removal from office (which was, in fact, the only issue not previously litigated in a court).⁵⁴ That issue, and that issue alone, should have been open for discussion in the Senate.

III. THE SOLUTION

A. A Two Track System

This article proposes that the impeachment process be bifurcated. Track One should provide an expedited procedure for those judges already convicted of felonies in federal court and sentenced to six months or more prison time.⁵⁵ Track Two should preserve the current system for all other judges against whom impeachment is being considered. When the factual issues have already been adequately litigated in a federal court, it is cumbersome and unnecessary for Congress to relitigate the case, and this proposal makes such re-litigation unnecessary. Expediting impeachment does not prevent Congress from removing judges through the traditional method; rather, the full process will be reserved for those situations where it is appropriate.⁵⁶

For those judges in Track One, the House of Representatives should, by the use of its internal rule-making powers, automatically impeach any judge convicted of any felony which is defined as an impeachable offense. This article also proposes that the Senate function on the model of an appellate, rather than a trial, court when trying Track One judges. This will allow the Senate to

State Judicial Conduct Organizations, 76 N.Y. L.J. 811 (1987). Statistics strongly indicate that these commissions address criminal, or close to criminal allegations against judges, rather than political removals. *Id.* For a more detailed survey of state mechanisms for removing judges, see KASTENMEIER REPORT, *supra* note 24, at 183-86.

54. See 132 Cong. Rec. 515759-03 (1986).

55. The conviction of these judges should have been affirmed, or the time to appeal should have lapsed without an appeal being filed.

56. The impeachment of Judge Alcee Hastings may well be such a case. Because Hastings was acquitted after a criminal trial, impeachment proceedings involving the full Senate rather than a committee would be appropriate under this model.

limit the actual trial procedure to a review of written briefs and a short oral argument before the entire Senate. Such an appellate-like procedure will also enable the Senate to employ the judicial doctrines of collateral estoppel, law-of-the-case, and issue preclusion, thereby limiting the issue before the Senate to the single question of whether the offense of which the judge was convicted merits removal from office. The Senate is the wrong body to establish historical facts of criminal guilt or innocence or necessary *mens rea*. It should accept the findings of the Article III court—its co-equal branch of government.

At the outset, it is important to stress two major limits on the scope of the proposal. First, this proposal does not apply in situations where a judge has been investigated or charged with a crime but not prosecuted or convicted, or whose conviction was not upheld on appeal. The doctrine of issue preclusion on which this proposal is based is simply not helpful where there is no standing conviction.

The second limitation is that the Senate would not necessarily employ issue preclusion when doing so would compel the Senate to acquit. Streamlining the customary process is inappropriate where guilt has not been proven “beyond a reasonable doubt” in an Article III court. Impeachment under this circumstance is essentially political—not because the Senate or House is acting in an overtly political manner, but because the decision to remove is based upon a lower standard than “beyond a reasonable doubt” as to the fact of criminal activity.⁵⁷ In this situation, the Senate must make independent findings of fact as to the elements of the alleged offense, as well as determine whether that offense constitutes an appropriate ground for removal from office.

The Senate’s use of issue preclusion against a federal judge at an impeachment trial, as advocated by this article, fits comfortably within the parameters of the use of issue preclusion generally as defined by the Restatement (Second) of Judgments, which provides that:

57. This assumes that, where possible, the government will seek a criminal conviction before impeachment. While this was not historically true, it is the current trend and has been followed in the trials of Judge Claiborne (*see supra* note 6), Judge Hastings (*see supra* note 16), Judge Nixon (*see supra* note 6), and Judges Aguilar and Collins (*see supra* note 7), who are currently under indictment.

With respect to issues determined in a criminal prosecution[, a] judgment in favor of the prosecuting authority is preclusive in favor of the government . . . in a subsequent civil action between the government and the defendant in the criminal prosecution, as stated in § 27 with the exceptions stated in § 28.⁵⁸

None of the exceptions found in § 28 apply to the case of a federal judge tried for a felony when imprisonment in excess of six months is possible.⁵⁹

The only modification required to make § 85 clearly applicable to impeachments would be to add the words “and impeachment” after the words “civil action.”⁶⁰ Indeed, the illustrations

58. RESTATEMENT (SECOND) OF JUDGMENTS § 85 (1982). Section 27 provides:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Id. at § 27. All subsequent references to the RESTATEMENT (SECOND) OF JUDGMENTS, and illustrations drawn therefrom, stem from this edition and will therefore not be redundantly footnoted.

59. Section 28 lists the following exceptions:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Exceptions (1), (2), (3), (4), and (5) (b) and (c) are inapplicable. Exception (5) (a) is the only one that potentially could be applicable; given, however, the manner in which the Senate would conduct such a hearing, it is unclear if a retrial in the Senate would actually solve the problem addressed by this section. In addition, it is unclear if the public interest would be so acute if the judge were not a Supreme Court Justice. (It is worth noting that Judge Claiborne was *not* disbarred from practicing law in Nevada after his conviction due to significant lingering doubts about the fairness of the process used to remove him, notwithstanding the enormous energy invested in this process; see *State Bar of Nevada v. Claiborne*, 756 P.2d 464 (Nev. 1988)).

60. A strong case may be made, however, that the term “civil action” in § 85 already includes impeachment. As noted in *Grimes*, *supra* note 21, at n.157:

found in § 85 reflect this situation perfectly. Illustration Two states:

T is convicted of the crime of fraudulently understating his income tax liability. In a subsequent civil action by the government to recover the taxes due and a civil penalty, the judgment in the criminal prosecution is preclusive in favor of the government on the question whether T's failure to pay was fraudulent.

The same should be true were Judge T to undergo an impeachment trial: Judge T should be precluded from arguing that he did not commit tax fraud. Of course, Judge T is not precluded from arguing that impeachment is not an appropriate penalty in this situation, and his defense would then have to explain his conduct.

Illustration Four states:

In a criminal prosecution for price fixing, D contends that his activity is not within the terms of the criminal statute relied on by the prosecuting authority. That contention is rejected and D is convicted. In a subsequent civil action by the government to recover civil damages suffered as a result of the price fixing, D is precluded from disputing that his activity was illegal.

Issue preclusion should also preclude a convicted Judge D from re-litigating the applicability of the statute, since "in order to obtain a favorable judgment in a criminal case the prosecuting authority must establish the factual elements of the offense by a proof standard substantially greater than that required" in an impeachment action.⁶¹

Illustration One of the *Restatement* examines issue preclusion in situations where the person has been acquitted of criminal activity. This rule is also relevant in the impeachment context. It states:

T is prosecuted for the crime of income tax fraud. Neither a conviction nor an acquittal precludes the government, under the rule of claim preclusion, from bringing a civil action to

[I]n the 1933 Louderback trial, the judge's attorneys argued that the trial, "while not criminal, is in the nature and partakes of the character of a criminal proceeding." The House Managers, in contrast, equated impeachment trials to a civil suit for ouster. The [House] managers argued similarly in the Ritter and Hastings impeachment trials.

(Citations omitted).

61. The comment uses the words "civil action" here—but the rationale is the same. See *infra* notes 93-97 for a discussion why the Senate historically has impeached under a standard lower than that used in criminal cases.

recover from T the amount allegedly due in unpaid income tax.

The same should also be true for Judge T who is acquitted of tax fraud. The government is permitted to seek impeachment and removal even after acquittal at a criminal trial. The rationale for this is simple: Since a civil action requires a lower standard of proof than a criminal action, the government's failure in its criminal claim does not at all diminish its rights to pursue a civil claim or an impeachment trial, which also has a lower burden of proof than a criminal trial.⁶²

However, there is an important difference in the relevant burdens of proof for cases where there was a conviction and for those resulting in acquittal. In the case of a conviction, the government has already proven its case, and need not do so again at trial.⁶³ In the case of an acquittal, while the government may pursue a civil claim or an impeachment if it so wishes, it bears the full burden of proof; furthermore, the judge's acquittal may be admitted as evidence at this impeachment trial.⁶⁴ Thus, expediting the impeachment process advocated in this article fits well within the model of preclusion advanced by the *Restatement (Second) of Judgments*.⁶⁵

B. *Expediting the Process: The Details*

The aim of this proposal is to establish an efficient, self-regulating process to remove (that is, impeach, try, and convict) federal judges who have been convicted of certain crimes⁶⁶ in federal court. This proposal would modify the procedures used, during impeachment by the House and trial by the Senate, to expedite the removal process. This proposal advocates revision, not revolution, and the goal is to develop a universally acceptable solution.

62. See *infra* notes 93-97.

63. See RESTATEMENT (SECOND) OF JUDGMENTS § 85, illus. 2, 4 (1982).

64. See 135 *Cong. Rec.* S1464-01.

65. The fact that collateral estoppel is unavailable to the government in criminal cases, see *Ashe v. Swenson*, 397 U.S. 436 (1970), is not relevant to impeachment cases. *Ashe* is uniquely predicated on the presence of the Fifth Amendment guarantees in the criminal trial context. It is thus not relevant to the impeachment context where constitutional guarantees are not present. See *infra* notes 93-97 and accompanying text.

66. For example, felonies that carry a penalty of at least six months' imprisonment. The determination of what the threshold will be is to be made by the House as part of its internal rulemaking.

This proposal streamlines the existing process in three important ways. First, the proposal establishes a mechanism under which a convicted judge will be impeached automatically, unless a majority in the House of Representatives votes to stop the process.⁶⁷ Second, it relies on a criminal conviction, affirmed by a higher court, to preclude the re-litigation of factual guilt and any facts necessarily established at trial as forming part of the criminal act. Third, it limits the issue in the Senate trial to the single question of whether the crime of which the judge was convicted is a "High Crime [or] Misdemeanor," or violates the "good behavior" clause within the meaning of Article III, and so warrants conviction and removal. The operation of this new procedure does not require either a constitutional amendment or a serious re-evaluation of the nature of impeachment.⁶⁸

The Justices of the Supreme Court should be statutorily exempt from this expedited impeachment procedure; it would only apply to district court and court of appeals judges (and perhaps to various Article I judges, who serve in close connection with Article III courts). While there may be no doubt that the expedited process could constitutionally be applied to the Justices of

67. Conviction leading to automatic impeachment does not place the impeachment power in the hands of the prosecuting body (the Executive Branch). If certain crimes are automatically impeachable, then the Executive Branch could simply prosecute a judge for an impeachable crime and not allow a plea bargain to a lesser, non-impeachable crime. However, the Executive Branch is not likely to get a successful conviction if the crime was not in fact committed. Also, since the House is solely responsible for impeachment rules, the House could block any impeachment if a majority deemed it appropriate. Thus, the power of impeachment will remain ultimately with the House.

68. See *infra* Section V for a survey of other possible solutions to this problem.

This proposal requires the application of both the principles of *res judicata* and collateral estoppel. The automatic impeachment by the House of a convicted judge may be analogized to *res judicata* (claim preclusion). The convicted judge is barred from contesting the impeachment, which is automatic. The prior judgment stands as *res judicata* in the subsequent impeachment proceeding.

When the impeachment reaches Senate trial, collateral estoppel (issue preclusion) is invoked. The previously convicted judge is not convicted automatically by the Senate, but rather is prevented from re-litigating the issue of his guilt, which has been conclusively determined in a prior judicial proceeding. See, e.g., *Jordan v. McKenna* 573 So. 2d 1371 (Miss. 1990) (holding that in a civil assault and battery action brought by a rape victim against her assailant, the assailant's conviction was conclusive, and he was collaterally estopped from re-litigating the issue of whether he committed the rape.) See also *S.E.C. v. Everest Mgmt. Corp.* 466 F. Supp. 167 (S.D.N.Y. 1979) (holding that because of higher standards of proof and numerous safeguards surrounding criminal trial, criminal conviction was conclusive in subsequent civil litigation between the same parties as to issues actually litigated and adjudicated in prior criminal proceeding); *Wolfson v. Baker* 444 F. Supp. 1124 (D. Fla. 1978) (holding that plaintiff in civil action was collaterally estopped from proving his ignorance of the unlawful nature of a transaction where he had previously been convicted in criminal proceedings arising from the same incident). See generally 46 AM. JUR. 2D *Judgments* §§ 615-18 (1969).

the Supreme Court,⁶⁹ neither of the policy arguments underlying the proposal support its application to Supreme Court Justices. There are only nine Justices—only one Justice has been impeached, and he was not convicted.⁷⁰ Thus, an argument based on conserving congressional resources has no merit. If criminal misconduct by a Justice were to arise and be contested, it would be of such extreme national importance as to merit Congress' complete attention. Further, the removal of a Justice would be a step of enormous political moment. Congress' full participation would ensure that such a drastic step is seen as legitimate and necessary.

The heart of this proposal, then, consists of three changes in the impeachment process for convicted judges.

C. Automating the Impeachment Process in the House

The House of Representatives should establish an automatic mechanism to impeach judges convicted of a defined class of crimes. This article suggests that the House should adopt the standard of a felony conviction with potential imprisonment of more than six months.⁷¹

The Constitution does not define the procedural mechanism the House should use for impeachment.⁷² The House is free to devise any procedure it wishes,⁷³ because the House is constitu-

69. It is important to distinguish here between this proposal and those put forward by other commentators who argue for various legislative means of removal as a supplement to impeachment. See Grimes, *supra* note 21; Luchsinger, *supra* note 21. These proposals suggest that legislation could reach and remove all judges of courts established by legislative act, on the (much disputed) theory that what the Congress creates it can dissolve; it could not, however, reach the Supreme Court, which is constitutional. This proposal does not suggest an alternative to impeachment, but rather a new understanding of its purely procedural requirements in certain circumstances. Thus, it could as easily be applied to Supreme Court Justices as to any other official subject to impeachment.

70. See *infra* note 142.

71. See *infra* note 86 for a possible House Rule spelling out this requirement.

72. The current process includes the following steps prior to the issuing of a bill of impeachment:

1. The issue is delegated to the Judiciary Committee either by Members of the House or upon recommendation by the Circuit Judges Committee after a full investigation, as under the "Judicial Discipline and Removal Reform Act of 1990" (title IV of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098 (1990)).
2. The Judiciary Committee investigates the allegation and votes to impeach if it believes that action is appropriate.
3. The full House then takes up the impeachment and votes whether to impeach.

73. For a survey of the various ways impeachments have occurred in the House, see the KASTENMEIER REPORT, *supra* note 24, at 33-35.

tionally charged with impeaching judges.⁷⁴ Two recent impeachments illustrate the *pro forma* nature of these proceedings: Judges Claiborne and Nixon were both impeached unanimously.⁷⁵ As with all situations in which the House is granted the right to make a political decision, the process it uses to make this decision is not subject to review or attack.⁷⁶ The method of impeachment (as opposed to conviction) is without any constitutional limitations other than that a majority of the House members approve.⁷⁷ Any method decided upon by the House would suffice—the process of impeachment is a purely internal matter, like the election of the Speaker.⁷⁸ In addition, for reasons discussed below, this summary impeachment would be a non-justiciable act of Congress not subject to review.

This article proposes that, by modifying internal House Rules, the House can greatly expedite the process.⁷⁹ Specifically, upon the certification that a judge was convicted of a crime that meets the House standard, the order of imprisonment by the clerk of the district court, as well as the certification of the affirmance by the court of appeals and denial of *certiorari* or affirmance by the Supreme Court, the proposed rule would require that a bill of impeachment be issued by the Clerk of the House of Representatives. This bill would list the commission of the crimes convicted as the grounds of impeachment, as well as a final ground of

In *U.S. v. Ballin*, 144 U.S. 1, 5 (1892), the Court ruled that there must be only a "reasonable relation" between the rules adopted and the goals sought. An application of this rule can be found in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1981), in which the court ruled that it was well within the power of the House of Representatives to establish rules of committee membership that dilute the representation of the minority party in various committees. This is the prerogative of the House. By analogy, in the same clause the Constitution grants the House the ability to select its own Speaker. There are no limits on the method used by the House. Any method—caucus, seniority, or other—that attracts the support of a majority of the House members is constitutional.

74. "The House of Representatives shall . . . have the sole Power of Impeachment." U.S. CONST., art. I, § 2, cl. 5. Legislative chambers also have the power of subpoena to investigate such charges; see *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

75. 132 CONG. REC. S14561-0 Part IV (daily ed., Oct. 2, 1986) (voting to impeach Judge Claiborne by 406 to 0); 135 CONG. REC. H1802-02 (daily ed., May 10, 1989) (voting to impeach Judge Nixon by 417 to 0).

76. As shown *infra*, Section IV.E, it is not even clear that the counting of the vote itself would be subject to challenge.

77. This answers the criticism that listing certain crimes as automatically impeachable puts the power of impeachment in the hands of the Executive Branch. See *supra* note 67.

78. Gerald Ford stated in his bid to impeach Justice William Douglas that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office." 116 CONG. REC. 11,913 (1970).

79. See *infra* note 86 for a sample Rule.

“bringing disrespect” on the judiciary because of the judge’s criminal activity. This bill would be adopted by the House as a resolution and sent to the Senate as a certified bill of impeachment.

No debate should occur, nor should this matter be first delegated to committee. Notification of the Clerk of the House by the clerk of the court of conviction would initiate the process, which would continue uninterrupted until a certified bill of impeachment was sent to the Senate.⁸⁰ This can be accomplished purely through a reorganization of the internal rules of the House. As the courts have ruled, the internal procedures used by the House are completely within the discretion of the members of the House itself.⁸¹ The Constitution gives no particular standard for the House to use, and judicial review is unavailable.⁸² If the House chooses not to require a roll call vote, but allows a voice or acclamation vote, that is unquestionably permissible.⁸³ All that is required is that the Senate be properly notified of the impeachment of a specific judge, of the articles of impeachment for the Senate to consider, and of the appointment of a committee to prosecute the case before the Senate.⁸⁴ In this revised proposal for impeachment, the first article prepared by the House should contain the specific allegation of criminal activity as grounds for impeachment, and the second article should repeat

80. Certification from the clerk of the court of a conviction for an Article III judge would be sent automatically to the Clerk of the House of Representatives, who would issue a formulaic bill of impeachment listing the proven violations of the law as individual counts. For the final count, he would add that violating the law of the United States had brought disrespect onto the judiciary, and is not “good behavior.” This bill could then be adopted as a resolution by the House of Representatives and signed by the Speaker as a duly certified bill of impeachment, and then be sent to the Senate for further consideration.

81. *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 590 (D.C.Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

82. *See infra* Section IV.E.

83. One could go even further and maintain that no form of a vote is required at all. The Constitution states merely that every bill “shall have passed the House of Representatives,” U.S. CONST., Art I, § 7, cl. 2, without ever specifying how such a bill does pass the House. The rule that majority vote is required is simply one of convenience in that it determines the will of the House that a particular bill shall pass. The House could establish alternative procedures for approval. The only time the Constitution requires a particular vote is on a vote to override a Presidential veto, in which a two-thirds vote is needed.

84. The prosecution of these cases is the key role of the House, and it should be delegated to the members of the Judiciary Committee. The fundamental argument presented at this stage is that the conduct warrants removal.

that allegation and add that this activity has brought disrespect to the judiciary and thus warrants removal from office.⁸⁵

In sum, the House should establish internal rules creating a procedure for the impeachment of judges who have been convicted of serious crimes.⁸⁶ These rules should automate the process to eliminate the need for an independent investigation and instead mandate impeachment, unless a majority of House members votes otherwise. The House would thus assume an almost formalistic function when dealing with judges who have already

85. Sample Articles of Impeachment (using the impeachment of Judge Walter L. Nixon) would read as follows:

Articles of Impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Walter L. Nixon, chief judge of the United States District Court for the Southern District of Mississippi, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

Article I, *Whereas* in February 1986, Chief Judge Walter L. Nixon, Jr., of the U.S. District Court for the Southern District of Mississippi, was convicted of two counts of making false declarations before a grand jury in violation of 18 U.S.C. § 1623 and was sentenced to five years imprisonment.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

Article II, *Whereas* by virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Whereas, Chief Judge Walter L. Nixon, Jr., of the U.S. District Court for the Southern District of Mississippi, was convicted of two counts of making false declarations before a grand jury in violation of 18 U.S.C. § 1623 and was sentenced to five years imprisonment.

He has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.

Wherefore, Judge Walter L. Nixon is guilty of an impeachable offense warranting removal from office.

This simple two-article, 300-word bill of impeachment compares with the 1000-word detailed articles of impeachment actually used. *See* 135 CONG. REC. H1802-02 (1989).

86. An example of a possible rule to be adopted by the House:

If any judge appointed under Article III of the United States Constitution shall commit and be convicted of a crime that is labeled as a felony, and is sentenced to a term of no less than six months, upon the certification of conviction and order of imprisonment by the Clerk of the District Court, as well as the certification of the affirmance by the Court of Appeals and denial of certiorari or affirmance by the United States Supreme Court, such judge shall be automatically impeached, unless more than one-half of the House of Representatives opposes such impeachment. The articles of impeachment shall be issued by the Clerk of the House of Representatives listing the commission of the crimes convicted as the grounds of impeachment. An additional article of impeachment shall be written concerning the bringing of disrespect on the judiciary as a result of the criminal activity. The articles of impeachment will then be adopted by a resolution indicating the desire of the House of Representatives to impeach and shall be sent to the Senate as a certified bill of impeachment.

been convicted in a criminal trial. After a criminal conviction, the House's role as prosecutor of the case in the Senate is more important than its role of grand jury. Like all House procedural rules, this rule can be changed by majority vote.⁸⁷

D. *Limiting the Issues Presented in the Senate*

The second crucial element of this proposal is a limitation of the issues that may be raised and argued at trial in the Senate. Under the doctrine of issue preclusion (collateral estoppel), the defendant judge would be allowed to argue only whether the charged offenses are appropriate grounds for conviction and removal. He would be precluded from contesting the substantive issue of his guilt for the crime of which he was convicted, since his guilt was already established in the prior criminal proceeding.

Issue preclusion is generally available in a civil proceeding when, in a prior proceeding, the identical issue was actually litigated and necessarily decided.⁸⁸ It can be employed only against a party who had a full and fair opportunity to litigate the issue in the first proceeding.⁸⁹ The prior proceeding may have been either civil or criminal. If it was a civil proceeding, the procedural rules and standard of proof are identical; if it was a criminal prosecution, the procedural rules and "beyond a reasonable doubt" standard are more stringent than those required in a civil action, so a finding of criminal liability would, *a fortiori*, compel a finding of civil liability.⁹⁰

With this in mind, the use of issue preclusion is clearly appropriate in the impeachment and removal process. First, the relevant issue—the defendant judge's guilt of the crimes set out in the articles of impeachment—will be identical to what was proven at the criminal trial. As the ultimate issue in the criminal case, it will have been necessarily decided. The judge, as the defendant in the criminal trial, will have had a full and fair opportunity to defend himself—indeed, a much fuller opportunity than if the Senate had been the original forum. There is little doubt that the judge will actually litigate the substantive issues at

87. See *supra* note 73 for cases supported the procedural autonomy of the House of Representatives. Thus, after conviction by a district court, a majority of the House could vote to refer the matter to the House Judiciary Committee and thus *not* to expedite the process.

88. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

89. *Id.* at §§ 27-28.

90. See *supra* Section II for a detailed discussion of this issue.

the criminal trial with all diligence, since an acquittal at the criminal trial is the best opportunity to end the allegation.⁹¹ Further, criminal trials conducted in federal court generally have the strongest, constitutionally-mandated procedural safeguards found in our system of law. Many safeguards guaranteed to the judge at a criminal trial are not available at an impeachment trial; however, the reverse is not true. For example, at trial a defendant must be convicted by a jury of twelve peers;⁹² the standard of proof at a criminal trial is "beyond a reasonable doubt";⁹³ and the full extent of constitutional guarantees against tainted evidence and illegal confessions will be applied. Further, the judge-defendant has the right of direct appeal to the Court of Appeals and the availability of a writ of *certiorari* to the Supreme Court to correct any errors of law or fact. None of these protections applies in the impeachment process. Only a two-thirds vote of the Senate is required to convict.⁹⁴ The standard of proof required is unclear; it might be as low as a "preponderance" standard.⁹⁵ Fifth and Sixth Amendment protections do not apply.⁹⁶ The rules of evidence, though generally applicable, can be overruled by majority vote of the Senate—a power the Senate has frequently used in the past.⁹⁷ In short, the rights of the defend-

91. An acquittal at trial is not necessarily the end of the proceedings in the Senate. Judge Hastings, for example, was acquitted in his criminal trial and impeached nonetheless. See 135 CONG. REC. S13782-01 (1989).

92. The right to a jury trial in criminal cases is guaranteed by the U.S. Constitution, U.S. CONST., art. III, § 2, cl. 2, and the Sixth and Fourteenth Amendments. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that the Fourteenth Amendment guarantees a right to a jury trial in all state criminal cases which, were they to be tried in federal court, would come within the Sixth Amendment guarantee).

93. See *Johnson v. Louisiana*, 406 U.S. 356, 359-60 (1972) (defining a "reasonable doubt" as doubt based on reason that arises from evidence or lack of evidence).

94. U.S. CONST., art. I, § 3, cl. 6.

95. "Senators determine their own burdens of proof: They need not be persuaded beyond a reasonable doubt that the defendant committed each and every element of every article." *Hastings v. U.S. Senate*, 716 F. Supp. 38, 41 (D. D.C. 1989).

96. The Fifth Amendment protection against double jeopardy does not apply because the impeachment trial is not a criminal proceeding and does not carry with it criminal sanctions. The same logic applies equally well to the Sixth Amendment right to a jury trial.

[W]ith regard to both the protection against double jeopardy and the right to trial by jury, the drafters of the Bill of Rights were of the opinion that it was obvious from the terms of the Constitution that those rights guaranteed by the Fifth and Sixth Amendments in all criminal matters, were not applicable to impeachment trials.

135 CONG. REC. S2046-03 (1989).

97. The Senate often relaxes the regular rules of evidence. For example, in the trial of President Johnson it was suggested that "[c]onsidering that Senators are, from beginning to end, judges of law as well as fact, and that they are judges from whom there is no appeal . . . it is deemed advisable that all evidence offered on either side not trivial or

ant are more strongly protected in federal court than in an impeachment trial in the Senate. It is thus easier for a defendant to obtain an acquittal at his criminal trial.

Given, then, that criminal prosecution affords more safeguards to a defendant than impeachment does, the Senate should be able to rely on a criminal conviction (followed by an unsuccessful appeal) as conclusively establishing guilt of the charged offense. In the recent trial of Judge Claiborne, many Senators expressed precisely that view, and explained their votes to convict on that basis. Indeed, some even believed that they were bound by the jury's determination as to the facts of the case.⁹⁸ This naturally limits the question the Senators must decide to whether this violation of the law should be sufficient grounds for removal from office—a political question most appropriate for a political body.

E. *The Procedural Model Used in the Senate*

One final change is required to streamline the process. The Senate should shift its model of procedure away from that of a trial court and toward that of an appellate court. This flows logically from the previous change; once the Senate is deciding only legal, and not factual, issues, the best model is that of a court of appeals. To achieve this, two fundamental changes must be made: The Senate should adopt the convention of receiving short briefs on the legal issues incorporating the general rules of appellate practice,⁹⁹ and it should accept concise oral presentations as is customary in appellate argument. There would be no delegation of authority to any type of committee, as currently di-

obviously irrelevant in nature shall be received without objection." HINDS' PRECEDENTS, *supra* note 11, at § 2219. Arguably, this is a good thing; many of these rules are designed to prevent confusion or manipulation of a lay jury and are not really necessary in the Senate, which includes many lawyers. Even if this is true, though, it does not alter the basic argument that more procedural protections are available in a criminal prosecution than in impeachment.

98. For example, Senator Bingaman stated with regard to the impeachment of Judge Harry Claiborne that

if we do not go forward with a conviction in this case, we have the anomaly of leaving a Federal district judge in office while he also continues to be labeled a felon under the criminal laws of this country. To my mind, that is an unacceptable result in this particular case that has been presented.

132 CONG. REC. S15759-03 (daily ed., Oct. 9, 1986).

99. For example, briefs should include a statement of the case, issues presented, and facts. The conventional rules of appellate practice contain a limit of 50 pages for briefs; *see* FED. R. APP. P. 28(g). The brief supporting conviction and removal should, of course, be written by the House of Representatives.

rected by Senate Rule XI.¹⁰⁰ Every voting Senator would hear all the evidence presented, which would essentially resolve the due process concerns with the current system.¹⁰¹

In such a procedure, the judge-defendant would argue that the criminal conviction does not warrant removal from office. For example, a judge could argue that it is acceptable for him to remain on the bench after this particular criminal conviction because the crime was petty.¹⁰²

After the distribution of briefs, oral arguments should be scheduled in the Senate in the same manner as an appellate court—brief arguments open to questions from the floor.¹⁰³ At the conclusion of oral argument, the Senate should hold a closed session to deliberate the fate of the judge. The Senate, after having considered all the issues, need only vote whether to convict based on the question whether the crimes proven at trial merit removal from office. At the conclusion of deliberations, the Senate should hold an open vote on the articles of impeachment.¹⁰⁴

The process allows for all of the key elements necessary for sound legal decisionmaking: strong briefs, which are the backbone of any appellate case; oral arguments to focus attention on the key issues in the case; and judicial deliberation. This change from a trial to an appellate model permits a focus on the key issues, without the sidetracking almost always necessary in a trial that serves as the first finding of facts. This model instead takes into account the prior finding of fact at trial.¹⁰⁵

100. See *supra* note 38 for the text of Rule XI.

101. This would also address the related concerns of several Senators. See *supra* note 39.

102. A judge could also argue that the illegal act was morally correct under the circumstances. For example, a judge who was convicted of harboring fugitive slaves in 1858 would have probably avoided impeachment on those charges.

103. Perhaps each side could be limited to 20 minutes of uninterrupted presentation followed by 20 minutes of questioning from the Senators. A short rebuttal time may be appropriate as well. Interactive questioning by judges in oral argument is difficult in a chamber of 100 "judges."

104. Unlike the current procedure under which all testimony is heard in committee with very few Senators attending, under this proposal all Senators would read the briefs and attend oral argument. Missing either should deny a Senator the privilege of voting on the removal. Indeed, perhaps by streamlining the procedure and focusing the issues, this proposal would encourage more meaningful senatorial participation.

105. An example of a rule which could be adopted by the Senate:

In the trial of an impeachment in the Senate, the Senate shall receive from the House of Representatives and the counsel of the impeached a brief, limited to fifty pages, containing the arguments to be presented by each side respectively. Each side shall have twenty minutes to present its argument orally to the Senate, followed by twenty minutes for questioning from Senators, unless otherwise ordered by the Senate upon application for that purpose. At the conclusion of oral argument, the Senate shall debate, in closed session, whether the crimes so com-

F. *Applying this Proposal to Past Impeachments*

Historically, impeachment has been used in the judicial context both as a mechanism to remove judges guilty or accused of criminal activity or misbehavior, and as a political tool to punish judges for ideological beliefs or behavior. As of 1993, one Supreme Court Justice, one court of appeals judge and ten district court judges have been impeached by the House; the Senate has convicted and removed seven from office.¹⁰⁶ These impeachments have arisen in four settings: when judges have been criminally tried and convicted, when judges have been accused of misconduct but have not been indicted for any crime, when judges have been indicted but acquitted of those charges, and when judges have not been accused of any serious misconduct but are politically unpopular. Had the proposal been in place throughout the nation's history, a substantially similar outcome would likely have resulted in each of the prior cases. Moreover, for impeachments in each but the third category, the proposal eliminates inefficient use of valuable congressional resources.

In the first category of impeachments, where the judges were indicted and convicted of crimes, two judges have been impeached and removed to date. Under this proposal, both of these judges would have been impeached and removed with significantly less congressional effort. The first was Harry S. Claiborne, U.S. district judge for the District of Nevada. The House impeached Judge Claiborne on four Articles of Impeachment, all relating to Claiborne's 1984 conviction on charges of tax eva-

mitted constitute an impeachable offense. When the issues have been deliberated, the Senate shall hold an open vote upon the Articles of Impeachment. Senators who fail to attend oral argument shall be denied voting privileges on these Articles of Impeachment.

106. For two excellent and comprehensive examinations of the history of impeachment of American judges, see ELEANORE BUSHNELL, *supra* note 5, and MARY L. VOLCANSEK, *JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE* (1993).

This list of ten district court judges does not include Judge Mark H. Delahay, a federal district judge in Kansas, on the assumption that he was not impeached. The Congressional Record is incomplete, and the author has surmised that he resigned before the House impeached him. See JOSEPH BORKIN, *THE CORRUPT JUDGE* 229 (1962). Bushnell, however, states that "[t]he House of Representatives impeached Judge Delahay in 1873 for unsuitable personal habits and for questionable financial dealings." BUSHNELL, *supra* note 5, at 1. Other authors have made this claim as well, but none has provided a citation. See, e.g., Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective* 76 *Ky. L.J.* 763, n.6 (1988). Bushnell admits that "no documentary record in the form of impeachment articles exists in his case," BUSHNELL, *supra* note 5, at 2.

sion.¹⁰⁷ The Senate convicted Judge Claiborne on three Articles of Impeachment, and removed him from office.¹⁰⁸

The other impeachment in this category was that of Walter Nixon, a district court judge from Mississippi, who was convicted of perjury¹⁰⁹ and impeached by the House in 1989.¹¹⁰ His criminal conviction and sentence withstood both direct and collateral attack, and Judge Nixon was in prison at the time of his Senate trial.¹¹¹ The Articles of Impeachment repeat the substance of the allegations contained in the criminal indictment, and charge that his conduct brought disrespect on the judiciary.¹¹² The Senate convicted Judge Nixon on the first two Articles of Impeachment.¹¹³

Two other federal judges have been convicted of felonies, and await impeachment proceedings as of this writing.¹¹⁴ For this category of impeachments, predicated on a prior criminal conviction, operation of this proposal would have replicated the ultimate removal by the Senate. However, because the scope of the Senate's role is limited under this proposal, the judges would have been removed with substantially fewer congressional resources expended.

The second category of judges that have faced impeachment consists of judges that have been accused of misconduct, but who have never faced criminal indictment. Under this proposal, the author would expect that the House would wait until criminal investigations of judges accused of crimes are complete, before considering impeachment. The conduct of five judges in this cat-

107. 132 CONG. REC. 515759-03 (1986).

108. *Id.*

109. *Nixon v. United States*, 703 F. Supp. 538 (S.D. Miss. 1988), *aff'd* 881 F.2d 1305 (5th Cir. 1989).

110. See 135 CONG. REC. D467-01 (1989).

111. See REPORT OF THE IMPEACHMENT TRIAL COMM. ON ARTICLES AGAINST JUDGE WALTER NIXON, JR., S. DOC. NO. 164, 101st Cong., 1st Sess., 1989.

112. 135 CONG. REC. H1802-02 (1989).

113. 135 CONG. REC. S14633-02 (1989). Judge Nixon challenged the Senate trial proceedings in federal court. See *supra* note 44.

114. On June 29, 1991, Judge Robert F. Collins of Louisiana was convicted of bribery, conspiracy, and obstruction of justice. See *Judge-bribery, Bombing Trials Come to End*, NAT'L L.J., July 15, 1991, at 6. Robert P. Aguilar, of the Northern District of California, was convicted on August 22, 1990 for lying to the FBI and revealing a wiretap. See *Aguilar Supporters Intensify Appeal Effort*, NAT'L L.J. Sept. 3, 1990, at 6. No Articles of Impeachment have yet been brought against these two judges, but in the near future, both will likely be impeached because of their felony convictions. If this proposal were to be adopted, the House should summarily impeach each judge, and the Senate should invoke collateral estoppel to limit each trial to the question of whether impeachment is the appropriate sanction. See *supra* note 7.

egory was sufficiently criminal in nature that the author believes each judge would have been indicted eventually, and criminally convicted.¹¹⁵ Thus, under the proposal, valuable congressional time could have been saved by permitting the judicial branch to determine issues of factual guilt.

Judge John Pickering, a New Hampshire district court judge, was impeached on four Articles, three of which related to legal violations in his handling of admiralty proceedings by the U.S. government, and the fourth alleged that he appeared on the bench drunk and used profanity.¹¹⁶ Pickering did not defend himself against these charges, although his son did appear and state that his father should be considered insane.¹¹⁷ The Senate convicted him on all four Articles and removed him from office.¹¹⁸ Had this proposal been in effect, Judge Pickering would likely have been tried criminally for misconduct on the bench. Had he been acquitted at trial—rather unlikely given the underlying facts—the impeachment would probably not have progressed;¹¹⁹ however, a conviction would have provided objective justification for his removal.

West H. Humphreys, a United States district judge in Tennessee, was also successfully impeached and removed by the Senate following allegations of unindicted misconduct. In 1861, Judge Humphreys refused to continue as a United States district judge, and declared himself a Confederate judge serving in the Confederate judiciary.¹²⁰ The Articles of Impeachment entered against

115. Indeed, if the proposal had been in place and the House had expressed its desire to await the outcome of criminal investigation, the Department of Justice might have proceeded more vigorously against these judges.

116. See TURNER, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 490 (1949); Feerick, *supra* note 10, at 27, and ANNALS OF CONG., 8th Cong., 1st Sess., 332-33 (1804). There is some reason to believe that the real motivation for the impeachment was political. Judge Pickering was the first victim of President Jefferson's campaign against Federalists in the judiciary. See Feerick, *supra* note 10, at 26 (citing ALFRED J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 167 (1919)). This was the only successful impeachment and removal that was at least partially politically motivated. Yet even here, Congress probably had sufficient apolitical grounds for removal: The judge at least conducted himself irregularly, perhaps venally, and was prone to decide cases based on political affiliation. See Turner at 490, and Feerick, *supra* note 10, at 27.

117. See Feerick, *supra* note 10, at 27, and ANNALS OF CONG., 8th Cong., 1st Sess., 328-29 (1804).

118. ANNALS OF CONG., 8th Cong., 1st Sess., 323-33 (1804).

119. Indeed, the successful impeachment of Judge Pickering can be distinguished from the unsuccessful Chase impeachment by the availability of reasonable evidence of Judge Pickering's criminal activity.

120. See Feerick, *supra* note 10, at 31. At least 16 other judges sided with the Confederacy as well—however, each resigned from the bench prior to switching loyalties. See EMILY V. TASSEL, *WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992*,

him all alleged treason, or treason-like activities.¹²¹ Judge Humphreys refused to appear and defend himself; he was convicted by the Senate, and removed unanimously in an *ex parte* proceeding.¹²² Had this proposal been in effect, the Union would likely have tried Judge Humphreys for treason and related crimes, convicted him, impeached him summarily, and tried him in the Senate, where removal would have been very likely. Given the openly criminal activity of Judge Humphreys, little would have been accomplished by a Senate trial on the merits.

Judge Robert W. Archbald, a Court of Appeals judge in the Third Circuit, was charged with selling influence while he served on the Commerce Court.¹²³ Judge Archbald was convicted on several Articles of Impeachment, all but one of which alleged criminal conduct.¹²⁴ Rather than re-litigating the substance of the allegations in the Senate, Judge Archbald contested only the propriety of impeachment as a sanction.¹²⁵ In that regard, this impeachment and trial should be a model in its scope. Indeed, little would have changed had this proposal been in effect, because Judge Archbald conceded the predicate acts, and the Senate trial was limited to the question of whether those acts were impeachable offenses.

Judge Halstead L. Ritter, a district judge in the Southern District of Florida, was impeached after a three-year House investigation into his conduct on the bench.¹²⁶ He was officially charged under seven Articles of Impeachment.¹²⁷ The six substantive Articles alleged that Judge Ritter accepted a bribe to determine the outcome of a case, and that he willfully evaded income taxes in 1929 and 1930.¹²⁸ Article 7 alleged that, as a consequence of the behavior described in the other Articles, Judge Ritter had brought his court into disrespect and rendered himself unfit to

RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, 1137, 1208-1209 (US Government, 1993).

121. Thompson & Pollitt, *supra* note 16, at 102, citing ALEXANDER SIMPSON, FEDERAL IMPEACHMENTS 197-99 (1916).

122. *Id.* at 102-3. A subsequent resolution was passed disqualifying him from ever holding any office of trust, honor or profit under the United States. See Feerick, *supra* note 10, at 32.

123. See Feerick, *supra* note 10, at 39-40.

124. 6 CANNON'S PRECEDENTS, *supra* note 16, § 512 at 707.

125. See Feerick, *supra* note 10, at 40-41.

126. See Feerick, *supra* note 10, at 46.

127. 80 CONG. REC. 3486-88, 4654-56 (1936).

128. See Feerick, *supra* note 10, at 46.

serve as a judge.¹²⁹ Judge Ritter admitted most of the facts alleged, but denied that he had any wrongful intent.¹³⁰ Ultimately, he was convicted only on Article 7, and removed from office.¹³¹ This case would have been much simpler had this proposal been in effect; Judge Ritter would likely have been tried in a criminal court prior to his impeachment. Had he been convicted of tax fraud and bribery in a criminal trial, Judge Ritter's claim that he lacked the requisite intent would have been necessarily decided against him at trial, and therefore the removal would have demanded less of the Senate's time.

In this second category, those accused of misconduct but not indicted, three judges have been impeached but not convicted by the Senate.¹³² The three judges are: Judge James Peck, a district court judge in Missouri who was impeached for serious misuse of his contempt power;¹³³ District Court Judge George English, who was impeached for abuse of his judicial power for his own financial benefit;¹³⁴ and finally, Judge Harold Louderback, a California district court judge who was impeached for judicial misconduct that resulted in personal gains for him and his friends.¹³⁵ The Senate did not find enough evidence to convict and remove these judges.¹³⁶ Under the proposal, the House has an incentive to wait for a full criminal investigation, namely savings in congressional resources. Had the House waited until the investigations were completed, the House would not likely have impeached these judges if there were not enough evidence for a criminal indictment or conviction.¹³⁷ The House and Senate would have saved time and resources, whatever the outcome of the criminal proceedings.

Only one judge in history falls into the third category, that of judges who were impeached and removed despite an acquittal in

129. *Id.*

130. 80 CONG. REC. 4899-906 (1936).

131. See Feerick, *supra* note 10, at 47.

132. Judge Swayne is discussed as a category four judge. See *infra* note 143 and accompanying text.

133. Judge Peck had sentenced an attorney to 24 hours in prison and 18 months' suspension from the bar in federal court in retaliation for an article the attorney had published. The article criticized Peck's decision in a case in which the attorney appeared. See Thompson & Pollitt, *supra* note 16, at 110-12.

134. See Feerick, *supra* note 10, at 43.

135. See Thompson & Pollitt, *supra* note 16, at 104.

136. See Thompson & Pollitt, *supra* note 16, at 30, 104; 6 CANNON'S PRECEDENTS, *supra* note 16, § 521 at 731-32.

137. Of course, under this proposal, the House can still impeach a judge who is not criminally convicted.

a criminal trial. Alcee L. Hastings, a U.S. district judge for the Southern District of Florida, was acquitted of criminal bribery;¹³⁸ he was later impeached for the same offense (and for perjury at his criminal trial),¹³⁹ and removed.¹⁴⁰ This proposal would not affect the impeachment process used against Judge Hastings or others similarly situated, as his criminal trial did not produce the conviction needed to serve as the factual predicate for the Senate to invoke collateral estoppel. Thus, the outcome would have been unaffected if the proposal had been in effect.

The fourth category of judges consists of those who were impeached primarily for political reasons, without any allegations of criminal misconduct. For example, Judge Charles Swayne, a Republican appointee, was impeached by the Democrat-controlled House in a straight party-line vote for relatively minor violations of judicial ethics;¹⁴¹ he was then acquitted in the Republican Senate.¹⁴² Indeed, impeachments that are motivated by politics have been successful at most on one occasion.¹⁴³ This proposal does not limit the power of Congress to remove a judge for political reasons, although an incidental benefit of the proposal might be that relatively minor misconduct allegations could not be used as pretext for political removal. Because these political impeachments have rarely led to removal, discouraging such impeachments is desirable. The number of politically motivated removals

138. See *Hastings v. Judicial Conference of United States*, 593 F. Supp. 1371, 1376 (1984). Judge Hastings' co-defendant was convicted in a separate trial. See *United States v. Borders*, 693 F.2d 1318 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

139. 134 CONG. REC. H6179-01 (1988).

140. 135 CONG. REC. S13782-01 (1989).

141. See *Thompson & Pollitt*, *supra* note 16, citing *Simpson*, *supra* note 121, at 585.

142. For a complete discussion of the circumstances of Judge Swayne's impeachment and acquittal, see *Feerick*, *supra* note 10, at 38. See also 39 CONG. REC. 754-55 (1905).

Perhaps the most egregious example of a judge being impeached for political reasons is Justice Samuel Chase. Judge Chase was an Associate Justice of the Supreme Court, appointed by President George Washington. See *Thompson & Pollitt*, *supra* note 16, at 92. He was impeached for misbehavior on the bench. The House Managers argued in the Chase trial that removal was appropriate for any judicial misbehavior or, indeed, simply because the Congress believed that another person could do the job better; Senator Giles stated that impeachment procedures are "nothing more than an inquiry by the two Houses of Congress whether the office of any public man might not be better filled by another." See *Thompson & Pollitt*, *supra* note 16, at 99. This position was not accepted in the Senate, and Justice Chase was acquitted on all charges. See *Feerick*, *supra* note 10, at 29. The Chase impeachment remains a critical turning point for the country as a whole. It firmly established the tradition that judges are not removed merely for unpopular opinions or because Congress feels that others could do a better job. The Chase impeachment was political, and deserved the full attention of Congress—the fate of an independent judiciary was on the line.

143. As noted above, by one view Judge Pickering's removal was politically motivated. See *supra* note 119.

under this proposal would be the same as that under the current system, but perhaps the House would engage in such political gamesmanship less frequently, thereby saving congressional time and money. This proposal produces at least one additional benefit—criminal trials and convictions of venal judges. At least sixteen judges resigned either during or after investigation in the House.¹⁴⁴ The majority of these judges committed crimes and escaped prosecution by resigning their position.

This section demonstrates that this proposal yields substantially similar results in each of the four categories of judges that have faced impeachment and removal. Further, the process would have proceeded more efficiently under this proposal, conserving scarce congressional resources in each category except that of judges who were acquitted in a criminal trial.

IV. DEFENSES AND POSSIBLE CRITICISMS OF THIS PROPOSAL

A. *A Policy Defense of this Proposal*

The proposal advanced in this article would certainly solve a number of the problems confronted by a Congress that may well be called upon again to try federal judges who have already been convicted in an Article III court. Re-litigating the substantive merits of a criminal conviction is a significant misallocation of the limited time and resources of the Senate, and is unlikely to convince any Senator to vote in favor of acquittal. For the Senate procedure to be meaningful, it must focus on the appropriateness of removal as a remedy given the criminal conviction. This is the sole issue that actually merits the Senate's concern and the application of its unique political expertise. To expect the Senate to review the factual correctness of a conviction affirmed in the judicial branch assigns to the Senate a task which, while constitutionally permitted, it is not accustomed to fulfilling.¹⁴⁵

The Senate, in short, is not a judicial body. Its strength lies in the resolution of political or policy questions. In the case of an impeachment, that question is whether a particular type of criminal activity warrants removal from office. The Senate, of course,

144. See Borkin, *supra* note 106, at 219-58.

145. This is not to say that the Senate institutionally, or Senators generally, are unfit for such a role; however, the Senate has adopted a model of policy determination that does not easily transfer to a fact-finding model. Like the Supreme Court, the Senate has a constitutional right to serve as a fact-finding court in certain circumstances; however, also like the Supreme Court, it would be wise for the Senate to seek to avoid that function whenever possible. For more on this issue, see *supra* Sections III.D and III.E.

reserves the right to reopen the impeachment trial to any broader issue, and this should only require the consent of a number of Senators sufficiently large to prevent conviction—more than one-third, rather than a majority. The Senate has already acknowledged this reality and delegated a special committee to collect factual information.¹⁴⁶

The standard of a felony conviction and imprisonment is the appropriate standard for the House to use to determine what constitutes an impeachable offense. Misdemeanors are too minor in the criminal framework to mandate automatic impeachment and removal. The threshold of six months' imprisonment was chosen for several reasons. First, the fact that a prison sentence was actually imposed¹⁴⁷ indicates that the crime was sufficiently serious that even a (presumably) first-time offender would be imprisoned. Second, the term in excess of six months means that the defendant's constitutional right to a jury trial must have been triggered.¹⁴⁸ This reduces the chance that the conviction was obtained by means of collusion or malicious prosecution, and adds to the moral authority of the judgment. Third, a significant sentence clearly indicates that the matter must have caused the defendant-judge to direct his full attention toward his criminal defense, a crucial component needed to apply collateral estoppel.¹⁴⁹ In addition, to avoid any possible bias of a state court, this article proposes that any criminal prosecutions for violations of state law by a federal judge be removed from state court to federal court, where they be tried and any resulting conviction be grounds for expedited impeachment.¹⁵⁰

146. See Senate Rule XI, *supra* note 38.

147. The status of a suspended sentence would appear to be identical to an actual sentence for the purposes of impeachment proceedings, because a "suspended sentence in criminal law means in effect that defendant is not required at the time sentence is imposed to serve the sentence." BLACK'S LAW DICTIONARY 1446 (6th ed. 1990).

148. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality opinion) (stating that the Sixth Amendment demands that a potential sentence in excess of six months triggers the right to a jury trial).

149. See RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

150. A related issue is the availability of criminal jurisdiction by the States over Article III judges.

Two other options are theoretically available. The first, immunizing federal judges from state prosecution, would immunize Article III judges from many laws crucial to our society, including laws against most murders and assaults. This option is not tenable. The second option is to make no distinction between state and federal conviction. A state court conviction would be valid evidence of misconduct and start the automatic impeachment process.

Given the dangers of either alternative, the appropriate solution is to remove the state trial of a sitting federal judge into federal court, in accordance with 28 U.S.C. § 1442

Indeed, proposals to expedite the process have been suggested by two different commentators within the last three years, each intended to restrict the purview of the trial in the Senate. Neither of these proposals, however, goes far enough in their restructuring, nor do they adopt the proper jurisprudential framework for such a restriction.

Professor Stephen B. Burbank has advocated "granting substantial preclusive effect to the findings of fact necessarily grounding a guilty verdict, at least when the judgment of conviction has been affirmed on appeal, and so long as those involved in the impeachment process consider claims of error regarding the antecedent fact-finding process that have not previously been

(1988), which provides for the removal of any civil or criminal action that commences in a state court against "any officer of the United States . . . for any act under color of such office." The Supreme Court affirmed the constitutionality of a closely related statute in *Tennessee v. Davis*, 100 U.S. 257 (1880). Justice Strong stated that the Supremacy Clause allows Congress to remove causes of action to federal court when they affect the workings of the federal government, including situations in which federal officers will be hindered in the performance of their duty. *Id.* at 265-66.

The statute in question only explicitly permits removal in situations in which the federal officer's defense is that he was enforcing or attempting to enforce federal law; it does not cover those situations in which a federal judge is indicted for violating state law in his personal, rather than judicial, activity, such as drunk driving or homicide. To solve this, two approaches are available. The first is to argue that the removal is required at the request of the Attorney General, since there is little doubt that, upon conviction and incarceration in state prison, the judge would be functionally prohibited from hearing cases. According to this rationale, any attempt to try a federal judge in state court hinders that judge's ability to function as a judge. Removal would always be statutorily permitted. (It has been widely accepted that this right of removal applies not only to defendants themselves but to the federal government requesting removal.) This approach, however, is not statutorily clear. In *State of Maryland v. Soper*, 270 U.S. 36 (1926), the Supreme Court appeared to interpret the requirement of action under the cover of office in a relatively strict manner. See generally John S. Strayhorn, Jr., *The Immunity of Federal Officers from State Proceedings*, 6 N. C. L. REV. 123 (1928). See also PAUL M. BATOR ET. AL., HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1338 (2d ed. 1973). It is also flawed, since it "implausibly assumes that—notwithstanding the creativity in sentencing that judges exercise daily . . . a court would impose a jail term upon conviction." Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?* 20 HASTINGS CONST. L. Q. 7, 52-53 (1992). Freedman notes that "[t]he overwhelming majority of convicted criminals in this country are not sentenced to prison, but probation." *Id.* at n.134, citing Stephen Labaton, *Probation Overload*, N. Y. TIMES, June 19, 1990, at A1.

The second solution is a statutory emendation to allow or mandate explicitly that the trial of federal judges for state causes of action be removed to federal court. This would, of course, resolve any dilemmas posed by the current problematical codification. Secretary of Labor Raymond Donovan sought to have a state criminal prosecution against him removed to federal court. His petition was denied because the alleged crimes were not committed under color of office. *Application of Donovan*, 601 F. Supp. 574 (S.D.N.Y. 1985). To afford satisfactory protections to federal judges, this limitation on removal must be excised. The assertion in the Kastenmeier Report, *supra* note 24, at 14, that statutory change is unnecessary to reach this result appears simply incorrect.

rejected by the courts."¹⁵¹ Yet this approach would eliminate much of the jurisprudential basis for this mechanism and turn it into a mere rule of convenience. Collateral estoppel *requires* that the findings be enforced unless they are found to be the product of corruption, bribery, or similar malfeasance.¹⁵² To allow *any* merit review after a full hearing before various Article III courts forces the Senate to conduct a full (or close to full) trial. Instead, just as in a civil case for tortious assault following a criminal conviction for assault, where the issue considered is limited to damages, so too impeachment proceedings should be limited to the question whether the judge-defendant should be removed from office. The grounds for substantive review of the validity of the criminal conviction must be very limited.¹⁵³

A variant on this proposal has been suggested by Professor Warren S. Grimes. In his formulation:

Both houses could focus their inquiries on whether the preexisting record needs to be supplemented to establish new evidence, or to reveal fundamental unfairness or a threat to judicial independence. Even if the defendant shows that a retrial is necessary, the Senate should be in a position to limit its scope. Starting with a fairly concise notion of the case against the judge . . . the Senate can make an informed pretrial determination about the need for evidentiary proceedings. To assist in this process, the Senate should permit issue framing pretrial motions from either side. . . . There is an analogous rule at work in the structuring of federal civil litigation: the motion for summary judgment provided in Federal Rule of Civil Procedure 56. Such a rule would offer the Senate an opportunity to dispose of the case before trial if there is 'no genuine issue

151. Burbank, *supra* note 21, at 690 (footnotes omitted). Professor Burbank adds:

[I]t is not clear how according preclusive effect to fact-finding in the circumstances described could plausibly be deemed unfair or inconsistent with the exercise by the Senate of its unique constitutional duty, which in these circumstances would seem to have less to do with fact-finding than with the characterization of the facts under the constitutionally prescribed substantive standard.

Id. at 691.

152. See RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982). None of the five exceptions noted are relevant to this context.

153. According to FED. R. CRIM. P. 33:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7 day period.

as to any material fact' and the moving party 'is entitled to a judgment as a matter of law.'¹⁵⁴

Yet this proposal is similarly limited in breadth and scope. It requires that the Senate consider the merits of each case to decide what needs to be reconsidered. Indeed, one suspects that this mechanism would require as much testimony and hearing as deciding the case itself. Assuming the judge-defendant denies the factual validity of the evidence against him, there will always be "a genuine issue of material fact" sufficient to withstand a Rule 56 summary judgment motion.¹⁵⁵ Indeed, in a certain formal sense, an affidavit from the judge-defendant alone would suffice to withstand a summary judgment motion. The proper analytical basis should be neither summary judgment nor weak issue preclusion. Rather, it must be law-of-the-case and hard *res judicata* such that the Senate need undertake no merit review of the underlying criminal conviction.

While both of these proposals refer to the House's attempt to convince the Senate to adopt some restrictions on the trial of Judge Claiborne, in fact that attempt most closely matches the proposal advanced in this article. These efforts by the House were recently described as follows:

In a pretrial motion, the House managers urged that *the Senate summarily convict Judge Claiborne* based upon the third impeachment article, which relied upon the judge's criminal convic-

154. Grimes, *supra* note 21, at 1248 (footnotes omitted). Grimes states that "the trial committee should consider the application of the judicial doctrine of collateral estoppel. . . . Collateral estoppel would allow the Senate to determine, for each previously adjudicated issue, whether retrial is appropriate; therefore it is a discriminating tool." *Id.* Nevertheless, he believes that this type of expediting would be negotiated by the Senate in every impeachment and would be very dependent on context. This article adopts a much stronger image of the use of collateral estoppel by the Senate, once a judge is already criminally convicted.

155. To grant summary judgment, a court (here, the Senate) must determine that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Summary judgment is inappropriate if, resolving all ambiguities and drawing all inferences against the moving party (here, the House of Representatives), the dispute about a material fact is "such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248-49 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970)). To defeat this motion, the non-moving party, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Therefore, to grant summary judgment in favor of the House, the Senate must construe all facts in dispute in the judge's favor. If the judge denies that his offenses are impeachable, when the facts are construed in his favor, the House cannot be granted summary judgment.

tion and the exhaustion of all direct appeals. *The managers found support in judicial doctrines of finality, collateral estoppel, and full faith and credit.*¹⁵⁶

The House's proposal was flawed because it removed from the Senate the crucial consideration that the Senate is constitutionally required to make—whether the judge-defendant is fit for office. In contrast, the proposal advanced in this article both expedites the process and makes it more just. The current system—where testimony is given to a panel of twelve Senators (none of whom must listen), issues already established and reviewed are relitigated, and votes are cast by Senators without any knowledge of the case—is seriously flawed. Instead, by properly defining its role and narrowing the issue, the Senate can proceed in the area of its expertise—political judgment. The result is a fairer, more democratic, and speedier impeachment process.

B. *A Constitutional Defense of this Proposal*¹⁵⁷

The constitutional defense of this proposal is as important as the policy defense. This proposal fits comfortably within either of two historical understandings of impeachment. Historically, commentators on the impeachment process fall into two camps: those who view impeachment as a political process and those who see it as an essentially judicial function, albeit one conducted by Congress.

Those who see impeachment as a political process, most notably Alexander Hamilton, argue that impeachment is the remedy of the body politic against a public official who has caused it harm.¹⁵⁸ Impeachment is clearly appropriate when, by criminal conduct, a judge brings dishonor on the judiciary in the eyes of the people. In Hamilton's view, because official misconduct involves an offense against the people, the decision to remove an

156. Grimes, *supra* note 21, at 1231 (emphasis added).

157. A discussion of the standing to challenge issue may be found *infra* Section IV.E. Lack of standing to challenge a particular congressional act does not render the act constitutional. A separate defense of its constitutionality is required.

158. A well constituted court for the trial of impeachments, is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

THE FEDERALIST No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* THE FEDERALIST Nos. 66, 69, 79 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

official should be made by the elected representatives of the people, in their name and on their behalf.¹⁵⁹ The process, however, should only be used to reach offenses that harm the government or the state. From the Hamiltonian “political-process” perspective, this article’s proposal—that Congress determine only whether a particular judge’s criminal actions rise to the level of harming government—is preferable to the existing state of affairs. The issues and the scope of argument would be sufficiently limited to enable the people’s representatives to make individual, informed decisions based on the relevant facts and law, instead of relying on the decision of a congressional committee.¹⁶⁰

The limitation of issues in the Senate, the reversal of the burden of proof, and the appellate-type model are all consistent with the Senate’s role as the Court of Impeachment. The role of the Senate is two-fold: Senators are not solely the jurors in the case but the judges as well. When the Senate votes on the fate of the impeached, it acts as a jury. When it decides matters of procedure, rules of evidence, and the format of the trial, it acts as a judicial panel.¹⁶¹ Thus the Senators are final arbiters of fact, law, and procedure, and they “try” the impeached judge in the sense of a European jurist. The Senate has the power to make substantive trial rules, including the application of *res judicata* and the allocation of burdens of proof. Limiting the Senate’s ability to apply traditional legal doctrines would effectively turn the Senate Court of Impeachment into a panel of 100 jurors with no judge.

Even those commentators who deny that the Senate can delegate the hearing of evidence to a committee (a power available to no other “judge” or “court”), would in all likelihood allow the application of *res judicata* and burden shifting in the impeachment process. Both are standard rules of procedure available to all triers of fact.¹⁶² Thus, a judge’s complaint that he was not

159. “What it may be asked is the true spirit of the institution [of impeachment] itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation, as the representatives of the nation themselves?” THE FEDERALIST No. 65, at 397 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

160. For a discussion of the constitutionality of the modification of the internal House rules, see *supra* Section III.C.

161. It is interesting to note that while the Constitution indicates that someone should “preside” at impeachment trials, “preside” has not been interpreted to mean to “decide legal issues.” The whole Senate has, as a body, voted on all procedural issues in past trials.

162. A judge delegating his power typically requires the consent of the parties. See FED. R. Civ. P. 39(a). Although this rule specifically concerns waiving the right to a jury trial, “[c]onsent to trial by magistrate was consent to non-jury trial and fact that magistrate,

tried on all the issues is no different from any litigant's complaint that his Seventh Amendment right to a jury trial is curtailed by refusing to submit issues to the jury that have previously been decided. The latter case is a standard *res judicata* application and completely constitutional.¹⁶³

The entire impeachment and removal proceeding clearly cannot be made automatic upon conviction; the Senate must reserve the decision whether removal is the appropriate remedy for the conviction. However, as to the factual basis of the criminal conviction, the Senate should be able to rely on a doctrine available to all other tribunals. That the Senate alone decides whether any particular offense is a "high crime and misdemeanor" warranting removal should satisfy those who consider impeachment to be an essentially political procedure—a process whereby a political branch of government makes the judgment that a particular individual has harmed the government and the body politic and must, therefore, be removed (and perhaps barred from future office as well).¹⁶⁴ While certain questions of fact and law will be decided by an Article III tribunal, the ultimate political choice remains with the Senate, which can choose not to remove from office.

This proposal also accords with the views of those who, like Professors Shartel¹⁶⁵ and Berger,¹⁶⁶ view impeachment as a judi-

three years later, permitted party to renege on consent and instead made recommended findings subject to *de novo* review by district judge did not undermine waiver of jury." FED. R. CIV. P. 39(a) Interpretive Notes and Decisions (citing *McCarthy v. Bronson*, 906 F.2d 835 (1990)).

163. See *supra* text accompanying note 68. In addition, during impeachment proceedings, the Senate is not acting as a criminal court and can thus accept or reject at its will procedures used in criminal cases. Concerning impeachment:

[a] review of the text of the Constitution, the historical evidence, analysis by and experts [sic] in the field of constitutional law, and pronouncements of both the House and the Senate regarding the nature of an impeachment proceeding, leads to the conclusion that the sanctions are remedial rather than punitive and the Framers did not intend impeachment to be criminal in nature.

135 CONG. REC. S2047 (1989).

164. The Senate votes separately whether to remove a judge from office and whether to bar that judge from holding future office. See S. DOC. 99-33 (1985). See also *Waggoner v. Hastings*, 816 F. Supp. 716 (S.D. Fla. 1993).

165. See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, Part III—Judicial Removal of Unfit District and Circuit Judges*, 28 MICH. L. REV. 870 (1930). Professor Shartel argues that the impeachment process mandated by the Constitution is inadequate. This inadequacy, he asserts, stems from its complexity, cost in time and money, and the inability of the House and the Senate properly to carry out their respective investigatory and judicial roles. He proposes that "[t]he federal bench should be authorized to remove its own unfit members," *id.* at 875, and asserts that the impeachment clauses should not be understood to be the exclusive means by which federal judges may be removed. *Id.* at 891. For more on this issue, see *infra* Section V.B.

cial function because it requires a judgment on individual guilt or innocence based on rules of law as applied to individual actions. For them, this proposal would represent an improvement over the current process because it would explicitly use judicial doctrines and devices—collateral estoppel, the limited nature of the role of an appellate court, and issue preclusion. The impeachment process may, without any substantial modification of its current constitutional framework, be used to remove judges rapidly who have been convicted of criminal activity and are thereby unfit for judicial office.

The use of issue preclusion is standard judicial fare. Since impeachment is a civil proceeding, the use of a criminal conviction to bar relitigation of the issue of guilt accords with the general rules of collateral estoppel.¹⁶⁷ After criminal conviction, then, the only judicial issue remaining is whether commission of the particular crime is sufficiently serious to warrant removal. Since this issue is not a matter of fact, no testimony need be taken, and the Senate may thus sit in a manner analogous to a court of appeals, deciding issues of law on the briefs.¹⁶⁸ It follows that the Senate, like a court of appeals, can limit the submissions on this issue to the submission of briefs with limited oral argument, thus decreasing the burden on Senators.

From the perspective of the judicial model, then, this proposal has certain clear advantages over the current process. As Charles Black has noted, if one accepts the judicial process as a model for impeachment, then one is driven to argue that all the Senators must hear all the evidence (and that the standard to be used is, at a minimum, that of a civil trial). The current process does not meet that standard: Evidence is heard in committee, while the

166. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973). Berger notes the illogic in the proposition that

if 'high crimes and misdemeanors' does not include all 'misbehavior,' it follows that judges guilty of misbehavior not amounting to impeachable misconduct are sealed into office, notwithstanding the teaching of the common law that tenure 'during good behavior' is terminated by bad behavior.

Id. at 124. Since "[t]he provision for judicial tenure 'during good behavior' is located in Article III, § 1, the Judicial Article," it would then follow that if misbehavior does not reach the level of an impeachable offense, the judiciary would be called upon to remedy the situation. *Id.* "The exercise of 'judicial power' is required because it was the design of the Framers to limit presidential and congressional interference with the judiciary." *Id.* at 134.

167. See *supra* text accompanying note 68.

168. In the view of the author, the Senate should also adopt a rule analogous to the Rule 29 of the Federal Rules of Appellate Procedure permitting the submission of *amicus* briefs by interested parties.

vote is taken by the Senate as a whole.¹⁶⁹ Under this article's proposal, the narrow focus of the issues makes it realistic to require that all Senators consider the parties' briefs and vote on the basis of the arguments set forth. Thus, the proposal should survive scrutiny under the judicial as well as the political model of impeachment.

C. Possible Deficiencies and Criticisms of this Proposal

A number of possible criticisms of this article's proposal, both as a matter of policy and of constitutional law, may be advanced. The most significant policy criticism arises from the diminution of the role constitutionally assigned to the House of Representatives. To impeach a judge, the Founders sought the independent political judgment of both Houses of Congress. This article's proposal, by contrast, effectively makes the House of Representatives' discretion not to impeach more difficult to exercise. This criticism of the proposal is essentially correct, although as a practical matter, it is unlikely that the House's role would be diminished, save in the (presumably rare) case in which a judge had been convicted of a crime under circumstances in which the House would not have voted to impeach.¹⁷⁰ In such a case, however, acquittal in the Senate, where only one-third need vote to acquit,¹⁷¹ is very likely. Indeed, the two federal judges who had been convicted of felonies and impeached were both impeached without a single dissent in the House.¹⁷² The small risk is worth taking.

From a constitutional perspective, one might also argue that this proposal violates the Senate's mandate to "try"¹⁷³ impeachments, since no real "trial" is taking place. Yet this view is not correct. The use of *res judicata* can deny a person who has been criminally convicted of assault a jury trial on whether the assault

169. Charles Black questions the constitutionality of this procedure:

The Standing Rules of the Senate provide that there may be appointed a 'Committee of Twelve' to hear evidence in the trial of impeachment and to report to the full Senate; 'twelve' must be borrowed from the jury system. This provision is of dubious constitutionality, in view of the language confiding to 'the Senate' and not to some part of the Senate, the 'sole Power to try all Impeachments.'

CHARLES BLACK, *IMPEACHMENT: A HANDBOOK* 12 (1974).

170. However, it is important to note that a majority of the House may vote to suspend the automatic impeachment process.

171. In the House, one-half of the members must vote to prevent an impeachment.

172. See *supra* note 75.

173. The Constitution gives the Senate "the sole Power to try all Impeachments." U.S. CONST., art. I, § 3, cl. 6. (emphasis added).

occurred in a later action for civil damages, even though the jury trial right is guaranteed by the Seventh Amendment.¹⁷⁴ Similarly, within the constitutional mandate of the word “try,” a Senate trial may exclude certain issues in impeachment proceedings through the use of *res judicata*.¹⁷⁵

For both the judge and the Senate, trying the case *de novo* only results in the squandering of resources. Even if it is valid to delegate the trial right to committee,¹⁷⁶ as is current practice, this proposal is more fair than the current system because it establishes a process by which the Senators can personally evaluate the merits of the judge’s arguments against, and the House’s arguments favoring, conviction. Narrowing the issue allows the Senate to require its Members actually to evaluate the limited issue under discussion and vote on the merits of that issue. By contrast, in the current system, the only motive a defendant could have to seek a long trial is the hope that the Senate lacks the diligence to see the trial through to the end—an obstructionist strategy that denies justice. Such tactics should not be acceptable and would not be possible under this streamlined and abbreviated process.

Others will argue that this proposed process gives the Executive Branch, and particularly the Justice Department, which pros-

174. The doctrine of collateral estoppel can be used in venues other than court. “Initially a doctrine confined to the federal courts, collateral estoppel effect is now frequently accorded to administrative adjudications.” Grimes, *supra* note 21, at 1248 n.208.

[A] question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies whether the second suit be for the same or a different cause of action.

State of Oklahoma v. State of Texas, 256 U.S. 70, 85 (1921). This is not to say that the parties must be absolutely identical, but rather that a “prior judgment of conviction in a criminal case for the identical acts set forth in a subsequent civil action conclusively establishes the issues adjudged in the criminal case against the defendants who were found guilty.” *U.S. v. Salvatore*, 140 F. Supp. 470, 472 (E.D.Pa. 1956). This rule is both cost-effective and just, because “collateral estoppel bars the relitigation of issues determined in a criminal proceeding in which the party against whom the earlier decision is asserted has had a ‘full and fair opportunity’ to litigate that issue.” *Fontneau v. U.S.*, 654 F.2d 8, 10 (1st Cir. 1981).

175. The argument against the use of collateral estoppel that the removal of a federal judge might involve issues more important than a criminal trial, because by removing a judge one curtails the power of the President who appointed the judge, is unpersuasive. Given the history of successful impeachments and the requirement that this expedited process be used only after a criminal conviction, it is unlikely that this process would be used to curtail significantly the power of a President. In addition, the proposal exempts from this process Supreme Court Justices, in whose case the possibility for this type of abuse could be greatest.

176. *Nixon v. U.S.*, 113 S. Ct. 732, 736 (1993).

ecutes federal judges, the power to remove them. This criticism has some merit, but the danger already exists that the Justice Department will investigate judges based on political motives or try innocent judges based on false evidence.¹⁷⁷ Expedited impeachment after criminal conviction, in and of itself, does not compound the danger.¹⁷⁸

Yet others will argue that this proposal does not solve the true problem—that the process seems to require a trial, and each Senator cannot participate in that trial. Those who are uncomfortable with trial by committee under Senate Rule XI, will be equally uncomfortable with a trial based on collateral estoppel. But under this proposal each Senator votes on removal after evaluating whatever facts are relevant to that question; the use of collateral estoppel creates only a common factual predicate for that judgment. This clearly constitutes a “trial.” Under the Rule XI procedure, by contrast, a committee functions as substitute judges for the whole Senate, at least to the extent of hearing all the evidence before reaching a judgment.

It is important to realize that this proposal does not advocate the conviction and removal from office of all federal judges convicted of felonies. It would be well within the discretion of the Senate to decline to convict a federal judge who, for example, has been convicted of willfully defacing a mailbox,¹⁷⁹ even if the sentence exceeds six months in prison. This proposal simply seeks to streamline the process for those judges whose conduct merits removal.

D. *Trying Federal Judges in Federal Court Prior to Impeachment*

One further criticism of this proposal may be advanced—that it is improper to indict and try a judge for a crime prior to impeachment and removal, because doing so would prevent him

177. See, e.g., *State Bar v. Claiborne*, 756 P.2d 464 (Nev. 1988), in which the Nevada Supreme Court declined to disbar Harry Claiborne notwithstanding his felony conviction and impeachment, citing evidence of a conspiracy by numerous federal agencies to convict Claiborne.

178. There is another danger here—the establishment of clear guidelines concerning what makes a conviction and sentencing “impeachable” might make a certain amount of plea bargaining inevitable. Most likely, however, such a plea bargain would include the resignation of the judge as part of the package. This was the case in 1978 when U.S. District Judge Herbert A. Fogel resigned with the understanding that his resignation would stop the prosecution against him. See Grimes, *supra* note 21, at 1218.

179. See 18 U.S.C. § 1705 (1982) (imposing a fine of not more than \$1,000 or imprisonment of not more than three years for the destruction of a mailbox). See also Burbank, *supra* note 21, at 191 (suggesting this example).

from functioning in accordance with his constitutional duty as a judge. While a number of commentators have argued that a federal judge may not be charged with violation of the criminal law,¹⁸⁰ this position has never been accepted and indeed has never attracted judicial approval, even in a dissent. As Justice Rehnquist, sitting as Circuit Justice for the Ninth Circuit, stated in *Claiborne*:

The first contention—that a federal judge may not be indicted and judged for a criminal offense until he is first impeached and convicted by Congress—has been rejected not only by the Court of Appeals in this case but also by the only two other Courts of Appeals to consider the question . . . I do not believe that four Justices of this court would vote to grant certiorari to review any one of these claims at the present stage of the litigation, and I therefore deny the application.¹⁸¹

Indeed, the argument that a federal judge is entitled to immunity from prosecution is clearly not supported by history.¹⁸² As of the date of this writing, at least nine federal judges have been subject to criminal indictment while on the bench.¹⁸³

The first argument raised in support of the claim for judicial immunity is from the language of Article I, Section 3, Clause 7 of the Constitution:

180. See, e.g., Steven W. Gold, Note, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699 (1987).

181. *Claiborne v. United States*, 465 U.S. 1305 (1986) (Rehnquist sitting as Circuit Justice for the Ninth Circuit). This issue was not explicitly addressed in the appeals of Judge Walter Nixon, but it is implicitly permissible. See *U.S. v. Nixon*, 113 S. Ct. 732 (1993). The Eleventh Circuit in *U.S. v. Hastings*, 681 F.2d 706, 711 (11th Cir. 1982) specifically answered this question, however, stating that "A judge no less than any other man is subject to the processes of the criminal law."

182. This issue was first raised in 1973 by Judge Otto Kerner. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), held that a federal judge could be tried criminally before impeachment. Despite this ruling, and other similar rulings in *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) and *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), some well-respected legal scholars hold the contrary. See BUSHNELL, *supra* note 5, at 319.

183. Judge John Warren Davis of the Third Circuit was indicted and stood trial twice before resigning in 1941. Judge Francis Winslow of the Southern District of New York was indicted in 1929 and resigned before his trial. Judge Otto Kerner of the Seventh Circuit was indicted, tried, and convicted for crimes that he committed before he became a judge. Chief Judge Martin T. Manton of the Second Circuit Court of Appeals was charged, much to the shock of Congress and the public, with judicial corruption in 1939. Judge Harry Claiborne of the District of Nevada was indicted, tried, and convicted of crimes committed while he was a judge. Judge Alcee Hastings was indicted, tried, and acquitted of crimes alleged to have been committed on the bench. Judge Walter Nixon of the Southern District of Mississippi was tried and convicted for crimes committed while a judge. See BORKIN, *supra* note 106, at 255-56. More recently, in 1992, Judges Robert F. Collins and Robert P. Aguilar were convicted of crimes. See *supra* note 7.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable or subject to Indictment, Trial, Judgment, and Punishment, according to Law.

The argument maintains that impeachment, followed by removal and then criminal trial, is the only constitutionally permissible sequence of events.¹⁸⁴ Yet the courts have never accepted this position; as the Eleventh Circuit noted in *Hastings*, the correct view is that the clause protects the procedural rights of the defendant during impeachment proceedings by limiting the scope of punishment that the *Senate* can mete out after a conviction.¹⁸⁵ Impeachment does not block a subsequent or previous criminal prosecution; the protection from double jeopardy does not apply after impeachment.¹⁸⁶ It was necessary for the Framers to limit the Senate's power to punish an impeached official because, at common law, impeachment by Parliament was a type of criminal procedure.¹⁸⁷ The Constitution changed this by limiting the remedy for impeachment to removal from office and a bar from holding future federal office, but did not prohibit separate criminal prosecution. The second argument for judicial immunity is a separation of powers claim that to allow the Executive Branch to prosecute federal judges grants the Executive impermissible control over the judiciary.¹⁸⁸ However, the Executive's authority to

184. Judge Claiborne made this argument, which was rejected by the Ninth Circuit. *United States v. Claiborne*, 727 F.2d 842, 844, (9th Cir. 1984).

185. *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982).

186. *Id.*

187. [I]mpeachments in England were themselves criminal prosecutions, in the sense that conviction could lead to the imposition of criminal sanctions. Their function and scope were different from what the framers envisioned for American impeachments. Impeachment in England could be directed at ordinary citizens—for high crimes—and not just government officials.

JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 27 (1978).

Official misconduct first became a common law crime in the late Seventeenth Century. *See* Anonymous, 87 ENG. REP. 853 (1704) ("If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law; and any public officer is indictable for misbehavior in his office."). *See generally* Raoul Berger, *Impeachment for 'High Crimes and Misdemeanors'*, printed in *Impeachment: Selected Materials* H. R. DOC. NO. 7, 93d Cong., 1st Sess., 617 (1973).

188. Steven W. Gold warns of

the potential for encroachment by the executive upon the federal judiciary by targeting a judge for an enforcement operation and, then, prosecuting prior to impeachment by the legislative branch . . . Thus, the pre-impeachment prosecution of a judge by the executive branch of government may violate the separation of powers doctrine.

See Gold, *supra* note 180, at 704.

prosecute members of the judiciary accords with both the spirit and the letter of the law. Judges are protected from civil suits arising from the exercise of their judicial function by the doctrine of judicial immunity, which “may be said to be as old as the beginning of the English common law.”¹⁸⁹ Similarly, Senators and Representatives are protected by specific constitutional provisions relating to their performance of their duties, such as immunity from suits based on speeches in the legislature.¹⁹⁰ To expand this protection to an absolute immunity would have the effect of placing judges above the very laws they are sworn to uphold. “[A] judge no less than any other man is subject to the process of the criminal law.”¹⁹¹ The Supreme Court stated the rule in its 1882 decision in *United States v. Lee*.

No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.¹⁹²

Indeed, the concept of complete immunity for federal officials was explicitly rejected in *Burton v. United States*,¹⁹³ which involved a Senator convicted of taking a bribe. The Senator argued that he could not constitutionally be tried, as this would prohibit him from performing his duties in the Senate and was thus tantamount to removal—a function reserved to the Senate. The Court rejected this contention, stating that no violation of the separation of powers principle or infringement on the Senate’s power of expulsion or impeachment would occur.¹⁹⁴ In *Chandler v. The Judicial Council of the Tenth Circuit of the United States*,¹⁹⁵ Justices Douglas and Black offered the broadest conception of judicial immunity in their dissenting opinion, but nonetheless agreed that if federal judges break a law, they can be prosecuted:

189. 46 AM. JUR. 2D *Judges* § 72 (1969). Without the doctrine of judicial immunity, the fear of civil liability would render judges incapable of reaching unbiased decisions. *See, e.g., Forrester v. White*, 484 U.S. 219 (1988) (holding that the Supreme Court may not ignore compelling reasons that justify broader protections for judges than for some other officials).

190. U.S. CONST., art. I, § 6.

191. *Hastings*, 681 F.2d at 711.

192. 106 U.S. 196, 220 (1882).

193. 202 U.S. 344 (1906).

194. *Id.* at 693-94.

195. 398 U.S. 74 (1970).

"[J]udges, like any other people, can be tried, convicted, and punished for crimes. . . ."196

Thus, while there is much merit to some form of judicial immunity, it does not, and should not, extend to situations unrelated to the proper exercise of a judge's role. Federal judges are liable for crimes committed while they are in office, and this proposal assumes that judges who commit crimes will continue to be indicted, prosecuted, and convicted prior to impeachment.¹⁹⁷

E. *Judicial Review in the Impeachment Context*

Is judicial review of impeachment available? In particular, if this expedited method of impeachment is adopted, may a constitutional challenge be successfully mounted on the merits of the expedited impeachment? Or, will a challenge fail under the myriad doctrines developed by the Supreme Court to defeat substantive review of certain types of legislative acts? This article concludes that a judge impeached under the proposed method of expedited removal would lack standing to challenge the process used for impeachment.

The judge might argue that his bill of impeachment was not duly enacted because of the expedited process. Yet, if prior case law on standing accurately indicates future holdings, the judge would not have standing to challenge the mechanism of impeachment and conviction. The Supreme Court has held in several cases that third parties, even those directly affected by legislation, lack standing to challenge whether events actually occurred in various legislative chambers as they have been described by those bodies.¹⁹⁸ The best illustration of this principle is *Field v. Clark*,¹⁹⁹ in which one party to a suit challenged the

196. *Id.*, at 141-42 (Black, J., dissenting). In *United States v. Brewster*, 408 U.S. 501, 508 (1972), the Court stated that

[t]he sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office. Such claims are inconsistent with the reading this Court has given, not only to the Speech and Debate Clause, but also to the other legislative privileges embodied in Art. I, Section 6.

Judges are no less immune to the criminal law. In fact, courts have reasoned that members of government bodies are under a stronger obligation to submit to the laws. This was decided implicitly in *U.S. v. Nixon*, 816 F.2d 1022 (5th Cir. 1987) and explicitly in *U.S. v. Hastings*, 681 F.2d 706, 711 (11th Cir. 1982).

197. This view was affirmed by the Kastenmeier Report. See KASTENMEIER REPORT, *supra* note 24, at 12-13.

198. See *Nixon v. United States*, 113 S. Ct. 732 (1993); *Coleman v. Miller*, 307 U.S. 433 (1939); *Leser v. Garnett*, 258 U.S. 130 (1922); *Field v. Clark*, 143 U.S. 649 (1892).

199. 143 U.S. 649 (1892).

legality of a statute relevant to the case, alleging that the law in question might not have been passed in both Houses of Congress. The Court stated that:

The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. *And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.*²⁰⁰

Further, such an act “carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress.”²⁰¹ The respect due to a co-equal branch mandates that the Judicial Branch not investigate whether a bill was actually passed as attested by the Legislative and Executive Branches. The Supreme Court will, of course, consider the constitutionality of the bill as passed. It will not, however, question whether or not such a bill actually was passed.

Applying the rule of *Field v. Clark* to the impeachment process, where the President has no legislative role, is relatively simple. Upon attestation by the Speaker of the House that a person was duly impeached, and attestation by the President of the Senate that two-thirds of the Senate did vote to convict and to remove, these two votes are beyond successful challenge. A judge so impeached could not argue, for instance, that a quorum was not present or a miscount of the votes occurred; the judge lacks standing.

This result is to be distinguished from an interbranch dispute between the Executive Branch and Congress regarding the validity of a bill. Such a dispute is between co-equal branches concerning the legality of their actions, and the Supreme Court will resolve that issue.²⁰² Judicial resolution of interbranch disputes is vastly different from a third party challenge to the constitutional-

200. *Id.* at 672 (emphasis added).

201. *Id.*

202. *See, e.g.,* *Prevost v. Morgenthau*, 106 F.2d 330 (D.C. Cir. 1939).

ity of the process by which a bill was enacted. When an individual challenges the validity of an act of Congress, no such interbranch dispute occurs, and the rule of *Field v. Clark* will be applied.²⁰³

A second analogy to the standing question in impeachment cases is the standing issue in challenging the process of constitutional amendment. The Supreme Court has held in at least two cases, *Coleman v. Miller*²⁰⁴ and *Leser v. Garnett*,²⁰⁵ that even persons directly affected by the amendment process lack standing to litigate whether events actually took place in the legislative arena once the appropriate official of the chamber has certified that they in fact occurred. In *Leser*, the Court upheld the constitutionality of the Nineteenth Amendment notwithstanding clear defects in the procedure by which it was enacted.²⁰⁶ The Court held that when the Speaker of the House and the President of the Senate certify that the requisite number of States have ratified a constitutional amendment, it is so ratified despite doubts that a number of States have not unquestionably ratified the amendment. The Court held that the process is not subject to judicial review and that all persons affected by the amendment are precluded from challenging it in court.²⁰⁷

Similarly, *Coleman v. Miller* involved a challenge to a proposed amendment to the Constitution by a member of the Kansas Legislature, brought when the lieutenant governor broke a tie in the vote to ratify the amendment. Members of the legislature argued that the U.S. Constitution allows only a "legislator" to vote. The Supreme Court ruled that individual members of the legislature

203. Whether individual Senators or Representatives who oppose this expedited impeachment process would have standing to sue on its constitutionality cannot currently be resolved definitively, although this article posits that standing would be denied. An individual member of Congress would be forced to sue the leadership of the House or Senate. Yet when no interbranch dispute occurs, no judicial remedy is allowed. The Constitution explicitly delegates to Congress the decision of its own rules and procedures. While one could argue, based on *Powell v. McCormick*, 395 U.S. 486 (1969), that the House's rules and procedures must be limited to conforming with the explicit constitutional requirements for a bill, even that limited deference would already be met here. The suing Senator would simply present the question whether a bill was in fact duly ratified by the requisite majority. Just as Congress would be the final arbiter of a legitimate controversy as to a Member's date of birth, so too a legitimate controversy between a Member of the Senate and the other Senators as to whether a bill was passed is a dispute which may be resolved only by the Senate. No judicial review is permitted. Thus, a challenge by an individual Senator to the validity of a bill of impeachment would not pass the requirements of standing necessary for judicial review.

204. 307 U.S. 433 (1939).

205. 258 U.S. 130 (1922).

206. *Id.* at 218.

207. *Id.* at 218-19.

lacked standing to determine whether the amendment was actually ratified.²⁰⁸

Similarly in impeachment, individual challenges to institutional results will not be permitted.²⁰⁹ This was precisely the holding in *Nixon v. U.S.*,²¹⁰ which stands for the proposition that judicial review of such matters is neither necessary nor possible. In his opinion for a unanimous Court, Justice Rehnquist stated that:

[t]he conclusion that the use of the word “try” in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments: the members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word “try” in the first sentence.²¹¹

It is thus clear that the Senate may adopt an expedited trial, as long as it conforms to the enumerated requirements of the Impeachment Trial Clause.

The constitutionality of abbreviating the impeachment procedure in the House is similarly non-justiciable. Judge Walter Nixon challenged the constitutionality of the expedited impeachment procedure pursuant to Senate Rule XI in *Nixon v. U.S.*,²¹² and as noted above, the Court held that Nixon’s claim was a non-justiciable political question.²¹³ The Court in *Nixon* dis-

208. 307 U.S. at 440-46. The Court did not reach the question whether the Lieutenant Governor of Kansas was a “legislator” and therefore could vote on the amendment. “Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion.” *Id.* at 447. Justice Black’s concurrence similarly stated that “we are unable to agree.” *Id.* at 458.

209. The most controversial part of this proposal, the automatic impeachment in the House and the application in the Senate of *res judicata* on the issue of guilt, will withstand constitutional challenge by denying standing to the judge to litigate whether or not a bill of impeachment was passed. The President, too, would be denied standing to challenge this issue; impeachment is not a bill within the normal meaning of a “bill” upon which the President is required to take action. See *INS v. Chadha*, 462 U.S. 919 (1985) (distinguishing between legislative actions on the grounds of whether the requirements of Bicamerality and Presentment apply).

210. See *Nixon v. United States*, 113 S. Ct. 732 (1993).

211. *Id.* at 736.

212. 113 S. Ct. 732 (1993).

213. *Id.* at 734.

tinguished its previous holding in *Powell v. McCormack*.²¹⁴ In *McCormack*, the Court held that a determination by the House regarding the qualification of its members was subject to judicial review.²¹⁵ The Court based its holding on the fact that, while the House has the general power to "[j]udge the . . . qualifications of its own members,"²¹⁶ this general power is limited by the three specific requirements for House membership enumerated in the Constitution.²¹⁷ Therefore, the House's claim to have unreviewable authority to determine its members' qualifications "was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership."²¹⁸ In contrast, the power of the Senate to "try" all impeachments is given in general terms only. Thus, the Court in *Nixon* concluded that "the word 'try' in the Impeachment Clause does not provide an identifiable textual limit on the authority which is committed to the Senate" and that the constitutionality of Senate impeachment procedure is therefore non-justiciable.²¹⁹

Accepting this line of reasoning, since there is no clear textual mandate as to how the House should impeach, the constitutionality of summary impeachment in the House would be non-justiciable. The primary task of the House, then, would be to prove to the Senate that the charge warrants conviction and removal.²²⁰

V. ALTERNATIVE POSSIBILITIES: A SURVEY OF COMPETING PROPOSALS²²¹

An entirely different criticism may be made of this proposal: that it is not revolutionary enough. There are numerous potential ways to solve the impeachment morass, and many of them involve various degrees of constitutional revision, from amendment to radical reinterpretation. Some academic scholars of the impeachment process have focused on the removal of federal

214. 395 U.S. 486 (1969).

215. *Id.* at 1956.

216. U.S. CONST., art. I, § 5.

217. These three requirements are that the candidate be at least 25 years of age, a citizen of the United States for no less than seven years, and an inhabitant of the State he was chosen to represent. U.S. CONST., art. I, § 2.

218. *Nixon*, 113 S. Ct. at 740.

219. *Id.*

220. See *supra* Section IV.D.

221. For a review of various statutory proposals and proposed constitutional amendments on the impeachment process, see *infra* pp. 209-16.

judges by methods other than impeachment and conviction.²²² This section will survey proposals to remove federal judges through alternatives to impeachment, critique each proposal, and demonstrate that the impeachment mechanism, suitably reformed, is currently the only viable process to remove federal judges.

A. *Constitutional Amendment*

Following nearly every impeachment, a Senator or a Representative (most recently, Senator Heflin²²³) has proposed an amendment to the Constitution to alleviate the currently unworkable process and permit judicially-mandated removal.²²⁴ While the proposals differ, they arise from the basic proposition that a committee of judges ought to be empowered to monitor the judiciary.²²⁵

The aim of these proposals has much merit, but the proposals suffer from two defects. The first is simply a pragmatic objection: It is highly unlikely that a constitutional amendment allowing for alternate procedures to remove federal judges can be successfully enacted by Congress and the States. The tradition of American government has been to refrain from correcting "minor flaws" in the Constitution, on the theory that tinkering with the document is generally unwise, and ought to be done only in the face of dire need.²²⁶ The removal of convicted judges, while a problem that may have to be addressed with increasing frequency in the fu-

222. See, e.g., Jon J. Gallo, Comment, *Removal of Federal Judges—New Alternatives to an Old Problem*: Chandler v. Judicial Council of the Tenth Circuit, 13 UCLA L. REV. 1385, 1390 (1966) (statutory means are possible and in fact exist); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 875 (1930) (federal judges should be authorized to remove unfit colleagues); Howell T. Heflin *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123 (1987) (constitutional amendment is required to remedy the impeachment quandary).

223. Senator Howell T. Heflin, the former Chief Justice of the Alabama Supreme Court, proposed that "[t]he Congress shall have the power to provide procedures for the removal from office of Federal judges serving pursuant to Article III of the Constitution, found to have committed treason, bribery, or other high crimes and misdemeanors." S.J. RES. 113 (1987). He then proposed that under this amendment a Judicial Inquiry Commission, consisting of appointees by the judiciary, President, and bar, should be established to investigate or initiate complaints against judges. Once a complaint is substantiated, it is filed with the Court of the Judiciary, comprised of members of the judiciary and the bar, that "has the authority to remove, suspend, censure, or otherwise discipline judges in the state." Heflin, *supra* note 21, at 125.

224. See KASTENMEIER REPORT, *supra* note 24, at 157-61, app. 1.

225. In fact, each of these proposals is based on the most common state model for the removal of judges—impeachment in combination with judicial discipline and removal.

226. See Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 632-40 (1979).

ture, is not yet such an emergency. In addition, history has shown that the energy, commitment, and resources required to adopt an amendment are available only in support of proposals that attract a broad consensus as to both the wisdom of the new policy and the pressing need for change.²²⁷ Whatever the merits of these proposals, it is extremely unlikely that a constitutional amendment effecting such a change will be ratified. Efforts are thus better focused on modifications within the existing constitutional framework.

The second objection to these proposals for judicial self-monitoring is the fear that judges will decide to remove other judges because of subjective feelings about the correctness or incorrectness of their colleagues' opinions, or about their personal behavior. Indeed, any substantial streamlining of the impeachment process creates the potential for abuse, but current proposals in this area seem not to address this problem. In fact, politicization of the removal power has occurred in many states using the most "successful" model of removal—by the voters.²²⁸

The Framers insisted that impeachment only be available in the hands of the peoples' representatives and only for very limited grounds, fearing that broad removal power would jeopardize the independence of the judiciary. While discussion in the Constitutional Convention focused on impeachment of the President, with the "Vice President and other civil officers" added almost as an afterthought,²²⁹ the applicability of the arguments to the impeachment of judges is clear.

227. "[T]he suggestion of a change in the Constitution's text almost inevitably reflects a deep national dissatisfaction with the way constitutional law . . . has theretofore resolved a matter." LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 24 (1985).

228. Indeed, the most successful method of removal in the States is judicial election, which is almost by definition tainted by politics. For example, California Supreme Court Justice Rose Bird was removed by a nearly 2-1 margin by California voters in November 1986. Their decision was based primarily—if not entirely—on her opposition to the death penalty. Justice Bird and two Associate Justices, Cruz Reynoso and Joseph Grodin, were voted out of office in "a bitter campaign in which conservatives attacked them for being soft on crime and hard on business." Paul Redinger, *Insurance: Customers Must Be Advised of Rights*, 73 ABA J. 94 (May 1987). Many critics have also suggested that her removal was also based on gender bias. Paul Redinger, *The Men's Club*, 72 ABA J. 48 (Nov. 1986). A political campaign against judges severely weakens the judiciary by forcing judges to tailor their decisions to meet the electorate's views. Judge Bird's removal, and others like it, prompted Justice Byron White to warn that "[i]f the people are to have the brand of justice to which they are entitled, judges must have sufficient protection against political or other pressures that threaten to distort their judgment." Philip Hager, *Warning by Justice White—Political Issues Seen as Threat to Judiciary*, L.A. TIMES, Aug. 11, 1987, at 3.

229. See MAX FARRAND, *FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79, 118, 166 (1925).

The legislature, rather than the Supreme Court, was given the power of removal because of two fears: Supreme Court Justices chosen by the President might not be impartial judges of presidential behavior; and, more significantly, a small group of people sitting as judges could more easily be corrupted, or swayed by inappropriate influences, and removal would become political.²³⁰ A two-thirds majority was required to convict in the Senate to minimize the chance that the politically disfavored could be convicted for their politics alone.²³¹ Further, the grounds were limited to "treason, bribery and other high crimes and misdemeanors" because the Framers decided that a looser standard—"maladministration," for example—would lead to judicial tenure subject to the whim of Congress.²³² In sum, impeachment, while an essentially political process with a political purpose, was severely circumscribed to avoid situations where politics alone could determine the outcome. This approach was further reinforced by Congress' decision not to remove Justice Chase for political reasons in 1804.²³³

The proposals advocating a constitutional amendment to allow for judicial removal of judges are not sensitive to the Framers' concerns. On the contrary, Senator Heflin's and other such proposals grant the judiciary plenary power to remove judges for whatever offenses or improprieties a court decides warrant removal. There is a significant risk of abuse in this process that would undermine judicial independence. This has unquestionably been the case in various states in which similar mechanisms exist.²³⁴ While abuse is also possible in the impeachment process proposed by this article, the removal of judges by members of the elected representative branch of government is more palatable than their removal by life-tenured members of the judiciary.

A final criticism demonstrating the lack of political sensitivity in these proposals is their application to the removal of Supreme

230. THE FEDERALIST No. 65, *supra* note 158, at 398.

231. THE FEDERALIST No. 66, *supra* note 158, at 406.

232. Feerick, *supra* note 10, at 48.

233. See Feerick, *supra* note 10, at 29 and *supra* at notes 12 and 143.

234. According to Senator Heflin, such a system "has worked extremely well" in Alabama. Heflin, *supra* note 21, at 125. Nevertheless, Alabama Governor Fob James said in 1982 that, "I never thought the judiciary was political. How naive I was." Bessie Ford, *Goat Hill Comments: Alabama's Chief Executive claims that the Courts Are Politically Motivated*, UPI, Aug. 22, 1982. Perhaps in retaliation for ruling against him several times, James asked Alabama's Judicial Inquiry Commission—consisting of people chosen by the state judiciary, the Governor, and the state bar for the purpose of investigating complaints against judges—to find that the six judges who ruled against him had a conflict of interest. *Id.*

Court Justices. The removal of a Justice, even in the face of clear criminal activity, is of such significance to the judiciary that a political mechanism—one that commands the attention and respect of the American people—must be used.²³⁵

B. *Statutory Alternatives to Impeachment*

Legislative proposals have frequently been made, allegedly within the present constitutional framework, to reform the removal of federal judges. Yet each of these proposals suffers from significant constitutional defects, political naivete, or excessive narrowness of application.

The first proposal along these lines, and perhaps the most creative, was made by Professor Shartel in 1930.²³⁶ His proposal is based on Article II, Section 2, Clause 2 of the Constitution, which reads in part:

[the President] shall have the Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law or in the Heads of Departments.* (Emphasis added).

Professor Shartel argued that Congress could constitutionally delegate both the appointment and the removal of inferior court judges to any of the persons or bodies mentioned in Clause 2, including the Supreme Court or the Courts of Appeals.²³⁷ Shartel maintained that the power to remove judges is necessarily a judicial power, a component of the judiciary's inherent ability to supervise and discipline its own personnel, and to act as administrator of its own functions and processes.²³⁸ This would be particularly true under Shartel's system, where judges appoint other judges. He pointed to the practice of removal of lower officers in both the Legislative and Executive Branches by those who ap-

235. The same is true of the President; his removal can never be understood as a simple question of justice, even though the grounds for removal include commission of a crime. Rather, removing the President or a Supreme Court Justice is always a political event.

236. Professor Shartel's proposal appeared in a series of three articles in the Michigan Law Review. See Burke Shartel, *Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485 (1930), 28 MICH. L. REV. 723 (1930), 28 MICH. L. REV. 870 (1930).

237. *Id.* at 892.

238. *Id.* at 884.

pointed them as support for his claim that “[p]ower to remove is a logical and necessary extension of the power to supervise.”²³⁹

Moreover, Shartel contended that removal was a particularly proper judicial function because it required the adjudication of a justiciable controversy between two parties.²⁴⁰ At issue is the right of a judge to continue in office, a question both of law (as regards the terms and conditions of judicial tenure) and fact (as regards the particular conduct occasioning the proceeding).²⁴¹ Furthermore, Shartel claimed that judicial removal of judges was consistent with English precedent and was acceptable under the constitutional requirement of separation of powers.²⁴² At common law, there were three basic routes for removing judges: executive, legislative, and judicial removal.²⁴³ Executive removal (removal by the Crown) was not, strictly speaking, pursuant to a removal power; rather, it was a consequence of the term of judicial tenure at common law—*durante bene placito*, “at the King’s pleasure.”²⁴⁴ This power was extinguished in England by the Act of Settlement in 1700, which changed judicial tenure to *grandiose bene gesserit*, “during good behavior.”²⁴⁵

Legislative removal consisted of three types—Bill of Attainder, Address to the Crown, and impeachment.²⁴⁶ Bills of Attainder were legislative declarations of guilt without a hearing.²⁴⁷ Legislative address was a kind of joint resolution, requesting removal, that the Crown traditionally honored.²⁴⁸ Impeachment took basically the same form as it does under the American system, with the House of Commons acting as grand jury and subsequently as prosecutor, and the House of Lords sitting in judgment. Finally,

239. *Id.*

240. *Id.* at 884-85.

241. *Id.* at 885.

242. *Id.* at 882-83.

243. *Id.* at 881-82.

244. *Id.* at 882.

245. Act of Settlement, 21-13 WILL. 3 (1701); 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 234 (1927). The practice did, however, continue in the colonies, and King George III’s abuse of this power was one of the wrongs enumerated in the Declaration of Independence: “He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” THE DECLARATION OF INDEPENDENCE (U.S. 1776).

246. Shartel, *supra* note 236, at 881.

247. BLACK’S LAW DICTIONARY 165 (6th ed. 1990).

248. Generally, Parliament and the King did not conflict on Bills of Attainder. Indeed, through a Bill of Attainder, “Parliament would lend an air of legitimacy to a blood letting desired by the King.” Berger, *supra* note 187, at 28. Problems arose only when Parliament wished a Bill of Attainder against a Minister whom the King liked, because the Bill required the consent of the King. *Id.*

at common law there were judicial proceedings for forfeiture of office held during good behavior.²⁴⁹ The nature of the writ depended on the type of position to be revoked: *Scire facias* was available against those who held office by patent from the Crown, while *quo warranto* was used against those in lower positions.²⁵⁰

Shartel argued that any of these methods not directly prohibited by the Constitution should be considered available under American law.²⁵¹ Executive removal is plainly barred by Article III judges' "good behavior" tenure, just as the Crown's removal power was eliminated by the Act of Settlement's establishment of good behavior tenure.²⁵² Legislative removal is circumscribed: Bills of Attainder are expressly forbidden by Article I, Section 9, Clause 3 of the Constitution; legislative address should be viewed as excluded because it was considered and rejected by the Framers during the Constitutional Convention.²⁵³ Impeachment, though approved in the Constitution, is limited in scope and remedy. Judicial procedures, however, were mentioned neither in the Constitution nor in the debates at the Constitutional Convention. So, in Shartel's view, they are not expressly barred; he argued that, since the principle of separation of powers would not be offended (since this would be purely an intrabranched activity), judicial removal of judges should therefore be considered constitutional.²⁵⁴ Accordingly, as an adjunct to impeachment, Shartel urged that either the courts of appeals be granted power to discipline and to remove lower judges within the circuit, or that the Chief Justice of the Supreme Court be empowered to appoint federal judges to a special disciplinary court that would handle only cases of judicial misconduct and remove judges so convicted.²⁵⁵

Two objections may be raised to Shartel's proposal. First, it is unwise to allow members of the Judicial Branch to remove co-members. Professor Shartel believed that any judges vested with such power would be solely interested in the efficiency of justice in the lower federal courts; yet, there is a legitimate fear that the remedy of removal might be employed for political or other rea-

249. Shartel, *supra* note 236, at 882.

250. *Id.* at 882-83.

251. *Id.* at 892.

252. *Id.* at 882.

253. See THE RECORDS OF THE FEDERAL CONVENTION 428-29 (Max Farrand ed., 1937).

254. Shartel, *supra* note 236, at 884.

255. *Id.* at 875-78.

sons. Even in the current system, allegations have surfaced that the certification of senior judges was withheld for political motives, as well as allegations that investigations of judges by circuit courts are conducted for racial or political reasons.²⁵⁶ Professor Shartel's proposal places too much trust in judges by giving them the power to appoint and remove one another.

Second, Professor Shartel's proposal rests on an extremely precarious historical basis and most likely would not withstand constitutional review. Shartel's interpretation of English precedent regarding judicial removal of officials at the level of federal judges has been convincingly refuted.²⁵⁷ Shartel argued that the English judiciary had the power to remove its own members and thus, whether or not the Framers knew of the relevant precedents, the judiciary they established must have the same power.²⁵⁸ However, the cases he cited fail to support the contention that common law officials *at a level analogous to federal judges* were removed by means of *scire facias*. Indeed, one writer analyzing these cases has shown convincingly that only court officials (auditors, sergeants-at-arms, and the like), but not judges, were so removed; "[e]ven in the unreformed common law, there was a distinction between precedents and fossils."²⁵⁹ Moreover, it seems unlikely that legal commentators in the Eighteenth Century believed that "good behavior" tenure carried with it a judicial procedure for forfeiture; William Blackstone, the leading English commentator of the period, did not mention it nor did any of the colonial or State constitutions.

256. The impeachment of Judge Alcee Hastings is an excellent example of an investigation alleged to have been conducted for racial or political reasons. In 1979, Judge Hastings became the first black federal judge in Florida. VOLCANSEK, *supra* note 106, at 68. Some believed that the dearth of black judges could be attributed to the sentiment that "[w]henver the white man surrenders to you one of his benches, he has given up one of his most precious tools." Gilbert Ware, *A Sense of History*, NAT'L. B. ASS'N. MAG., July 1988, at 36. The case against Hastings was unusual. He was acquitted of all criminal charges, where "the case was, by the prosecution's own admission, a circumstantial one; no direct evidence of Hastings's culpability was ever produced." VOLCANSEK at 69. That he was impeached after acquittal on a weak case raised suspicion about the motivation behind those wishing to impeach. Public confidence in Hastings is so high that in 1992 he won a seat as U.S. Representative from Florida, where he now sits as a member of the body that only recently impeached him.

257. See Martha A. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138.

258. He maintained further that, since the Framers employed a common-law term of art for judicial tenure, "good behavior," they must have intended to give that term its full common-law meaning, even if they did not fully understand that meaning. Shartel, *supra* note 176.

259. Ziskind, *supra* note 257, at 138.

Even if Shartel's historical analysis were correct, judicial removal would still be of extremely dubious constitutionality. The Constitution explicitly describes one impeachment process and no other, and the rule of construction *expressio unius exclusio alterius est* would lead one to conclude that other means are thereby ruled out. Certainly Hamilton, among the most authoritative of commentators on the Constitution, held that opinion, as do many contemporary writers.²⁶⁰ The fact that the other two Branches have the power to remove lower officials, not explicitly granted in the Constitution, is not particularly relevant or persuasive; none of these officials has the tenure during good behavior that Article III judges enjoy. "Inferior officers" used in that Article's context refers to assistants, not judges. Thus, even if removal by writ of *scire facias* or *quo warranto* were available at common law, the U.S. Constitution would not allow it.

Other proposals to reestablish the classical common law remedies for the removal of federal judges, most significantly that of Professor Raoul Berger, attempt to circumvent the impeachment process by allowing the House and Senate to regulate federal judges by means of writs of *scire facias* and *quo warranto*, rather than by impeachment.²⁶¹ First, one should ask whether this

260. Proposals based upon Shartel's analysis have occasionally been made in both the House and the Senate. In the 1930s and 1940s, proposals were made to allow the removal of federal judges through judicial trials. See 80 CONG. REC. S5937 (1936). See also S. 476, 75th Cong., 1st Sess., 81 CONG. REC. 620 (1937); 81 CONG. REC. S6195 (1937); 86 CONG. REC. H4222 (1940); H.R. 146, 87 CONG. REC. H8148-68 (1943). See generally, Comment, *Judicial Trial and Removal of Federal Judges*, H.R. 146, 20 TEX. L. REV. 352 (1942). H.R. 146 was resubmitted as S. 1506 in 1969. Each proposal has failed because of the basic view, as codified in the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Stat. 2035 (1980) (codified at 28 U.S.C. §§ 332, 372), that federal judges may not be removed from office absent impeachment and conviction. See Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery*, S. 1506, 118 U. PA. L. REV. 1064 (1970).

261. See Berger, *supra* note 187, at 127-35. The final mechanism frequently offered to remove incompetent judges is mandatory retirement for the elderly or senile. In fact, mandatory retirement may, in reality, be a throwback to previous attempts to control the Supreme Court *a la* the Roosevelt court packing plan. Typically, these proposals center not on judges who are paid but not working, but on the so-called "out of touch" elderly judges who function with no difficulty—members of other branches of government just do not agree with the results they reach.

Given that certification of senior judges can be withheld by the members of a circuit court, and that informal mechanisms unquestionably exist to prevent a judge who is no longer capable of hearing cases from doing so, there appears to be no reason to strip elderly judges of their titles. Further, the Judiciary Act of 1980 allows for the removal of a judge's caseload once he takes senior status. 28 U.S.C. § 294(c) (1980). In addition, this proposal is not really relevant to the problem at hand—these proposals do not solve the problem of expediting the removal of venal federal judges.

In addition to the formal mechanisms for removing judges, informal means such as peer pressure and control of assignment of cases always exist. The informal system is used

would in fact streamline the process. It is easy to imagine, as has been the case in a number of states, that this process would simply duplicate impeachment with all of its problems.²⁶² Congress would still have to evaluate guilt or innocence in a manner just as protracted as impeachment with no gained efficiency. Second, the adoption of any method other than impeachment and conviction that will remove judges is constitutionally suspect. The basic failures of such alternative proposals is more than political—it is jurisprudential and systemic. This article's proposal avoids those pitfalls.

C. *Disciplining Judges: Statutory Reform*

As opposed to constitutional amendment and statutory alternatives to impeachment, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the 1980 Act")²⁶³ more closely and effectively addresses the problems of the current system. Yet while it addresses successfully one of the two problems relating to the removal of federal judges, at the same time it exacerbates the other.

Broadly, the concept of impeachment has been subject to two distinct criticisms over the last two hundred years. The first, as stated by Lord Bryce, is that impeachment is such a powerful weapon that it cannot, in good conscience, be used to remedy minor infractions of the law and discipline judges whose misconduct warrants some form of punishment less drastic than permanent removal from office.²⁶⁴ The 1980 Act solves this problem by granting to the circuit Court the power to impose lesser sanc-

frequently, resulting in far more interesting and frequent incidents than in the formal system. For example, when a delegation of Supreme Court Justices in 1896 sought to encourage Justice Stephen Field to resign, they began the conversation by asking whether he remembered that 27 years earlier he had been assigned the same task as the junior justice to encourage Justice Grier to retire. Field, clearly realizing why the delegation was here to see him, responded in his witty way "Yes! And a dirtier day's work I never did in my life!" See CHARLES E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 75-76 (1928).

262. See KASTENMEIER REPORT, *supra* note 24, at 183-184.

263. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 94-458, 94 Stat. 2035 (1980). This Act was later amended by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098 (1990) (codified in relevant part at 28 U.S.C. 372). Title IV of the Judicial Improvements Act establishes the National Commission on Judicial Discipline and Removal. See *supra* note 29 and accompanying text.

264. "Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It . . . needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 208 (1891).

tions, including temporary suspension, various forms of discipline (including censure), and reduction of a judge's caseload.²⁶⁵ More significantly, the circuit courts can establish committees to investigate judicial misconduct for cases in which impeachment might be an appropriate remedy.²⁶⁶

However, the Act also seems to exacerbate the second major problem with impeachment: the lengthy, expensive, and cumbersome nature of the process.²⁶⁷ In cases for which impeachment is the appropriate remedy, the Act adds a layer of investigative hearings that almost certainly slows down the process of removal. Before 1980, the investigation of allegations of misconduct began in the House Judiciary Committee; under the current Act, another level has been added to this process—the circuit court investigation. The findings of this investigation are given to the House Judiciary Committee, which then conducts its own investigation. As in the impeachment and conviction of Judge Claiborne, the result is that even when clearly appropriate, removal is not expedited—it still takes between two and four years to remove a federal judge for misconduct warranting impeachment. Thus, while the 1980 Act has been a step towards effective reform, it must be coupled with a proposal such as this article's to expedite impeachment when it is clearly the appropriate remedy.

D. *The National Commission on Judicial Discipline and Removal*

On August 2, 1993 the Report of the National Commission on Judicial Discipline and Removal ("the Kastenmeier Report")²⁶⁸

265. 28 U.S.C. § 372(6) (West Supp. 1993). The Kastenmeier Report, *supra* note 24, at 87-92, gives numerous examples of the type of claims best addressed by the Act. They include minor *ex parte* communications, judicial disability, and unreasonable delay in issuing opinions. While these offenses are not trivial, neither are they grounds for impeachment.

266. See KASTENMEIER REPORT, *supra* note 24, at 170.

267. The process for such disciplinary action is outlined in 28 U.S.C. 372(c) (West Supp. 1993). Any person may file a complaint against a district or circuit judge with the chief judge of the circuit. The chief judge can then dismiss the complaint or appoint a special investigative committee consisting of the chief judge and equal numbers of circuit and district judges. Written notice is given to the judge under investigation. The committee files a written report and recommendation with the judicial council of the circuit. At this point, the judicial council may further investigate or "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit [.]" 28 U.S.C. § 372(c)(6)(B) (West. Supp. 1993). A list of possible sanctions is included. See *id.* If the judicial council believes that the actions of the judge under investigation are serious enough to be impeachable offenses, then it must notify the judge under investigation and "certify and transmit the determination and the record of proceedings to the House of Representatives." 28 U.S.C. § 372(c)(8)(A) (West. Supp. 1993).

268. See *supra* note 24.

was issued. As noted earlier,²⁶⁹ this Commission was created to study the problems involved in the discipline and removal of an Article III judge, and to advise Congress of the viability of alternatives (including Constitutional amendment) for discipline or removal of judges.²⁷⁰ While the Commission agreed with one of the central contentions of this article—that the impeachment process should not be removed from the purview of Congress and that thus no constitutional amendment was prudent²⁷¹—the Report does not address the crucial distinction advanced in this article: the difference between the impeachment process for judges who have been already convicted of crimes and those who have not. Rather the Report advocated that four²⁷² procedural changes be adopted:

1. The House should (but need not) use a proper conviction as evidence of underlying facts to avoid repetition in its own proceedings.²⁷³
2. The Senate should consider “experimenting”²⁷⁴ with various ways to delegate pretrial work, such as using special masters to hear testimony.²⁷⁵
3. The Senate should consider amending Senate Rule XI to permit the Committee of Twelve or each of its members to

269. See *supra* note 24 and accompanying text; see also KASTENMEIER REPORT, *supra* note 24, at 1-8.

270. See *supra* note 24 and accompanying text.

271. See KASTENMEIER REPORT, *supra* note 24, at 17-26. The Report took this course for three reasons: “First, the system of life tenure implies that judicial removal is a very serious undertaking. If the framers so valued judicial independence as to call for service during good behavior, then it follows that the removal of a judge ought to be a difficult matter, one requiring the close attention of government.” Second, “[j]udging whether the public trust has been violated or the power granted by the people misused is fundamentally a political decision, one that should be made by officers who answer to the voters.” Finally, the Report indicated that if its other recommendations are adopted it “may make it more likely that judges who have committed crimes will resign before impeachment is necessary.” *Id.*

272. The Report made numerous recommendations. See *id.* at 147-155. However, the overwhelming majority do not change the status quo and are recommendations of greater cooperation or further diligence, rather than changes in procedure.

273. See *id.* at 44-47. The Report did not, however, recommend any form of automatic impeachment based on the conviction. In the author’s opinion, the primary gains in speed, efficiency, and justice result only if application of the principle of issue preclusion is automatic and not discretionary. To make it discretionary simply shift the debate to an earlier stage in the hearing (at which time the House will debate extensively whether to apply the rules of collateral estoppel). In a relatively minor change, the Report also recommended that the House cease filing a “replication” to the respondent judge’s answer. *Id.* at 48-49.

274. *Id.* at 55.

275. *Id.*

make proposed findings of fact and recommendations on individual articles of impeachment.²⁷⁶

4. Except in unusual circumstances, the Senate should apply issue preclusion to matters necessarily determined against a judge in a prior criminal trial.²⁷⁷

Each proposed change is designed to expedite the process of removal, which, in the view of the Commission, is a primary problem.²⁷⁸ However, the Report does not address the crucial failures of due process outlined in Part II of this article.²⁷⁹ This article maintains that the Senate does not have the time, resources, or institutional temperament to make routinely what is essentially a factual determination whether a specific crime occurred.²⁸⁰ Speed of adjudication is not the only problem in the current impeachment process.

Each recommendation advocated by the Commission, therefore, can do little until the crucial issue is addressed: narrowing the core question the Senate is to decide. The appointment of a "special master" (instead of a Committee of Twelve) authorized to make an initial determination and recommendation will only compound the problem of forcing Senators to determine factual guilt or innocence without hearing all (or even any) of the evidence. More seriously, the Commission ignored the possibility that a Senator will diligently perform his duties and attempt to hear all the evidence. Such a Senator would spend an inordinate amount of time on this process to the detriment of his other weighty duties.²⁸¹ The Report is committed to the status quo for impeachments, and that commitment forces it to propose only minor changes in the process for reforming impeachment.²⁸²

As long as the Senate remains committed to the image of being a "trial court" granting *de novo* impeachment trials, the cru-

276. *Id.* at 56. In addition, the Senate recommended that the Senate modify Senate Rule XI to reflect this change. *Id.* at 56-57.

277. *Id.* at 57-59.

278. *Id.* at 1-8.

279. Only the separate statement of Senator Howard Heflin clearly articulates the jurisprudential failures of the current system. *See id.* at 131-36. That Senator Heflin, the former Chief Justice of the Alabama Supreme Court felt compelled to make a separate statement, reflects, in this author's opinion, the crucial failure in the Report.

280. *See supra* Section II.

281. Even the recommendations of the Report itself seem to be incompletely stated. Thus, when issue preclusion is addressed, there is no discussion of the source of the conviction, or what punishment was given upon conviction, to determine whether issue preclusion ought to be applied. *See KASTENMEIER REPORT, supra* note 24, at 44-47.

282. *See* Deborah Pines, *Minor Changes Urged in Disciplinary Process for Federal Judges*, N. Y. L. J., June 22, 1993, at 1.

cial problem will remain—that impeachments expend too much of the House and Senate's most precious commodity—time. Every proposal of the type advanced by the Report, designed to keep the basic framework of a trial court but reduce the time it takes to hold a trial, results in a trial procedure that is less than fair to the defendant, and one that conscientious Senators cannot approve.

The Kastenmeier Report missed an opportunity to bifurcate the process to reflect two crucial distinctions in handling impeachments: the "political" versus the "housekeeping" removal and the "trial" versus "appellate" model. Impeaching a convicted judge presents a housekeeping task satisfied by an appellate-type review; the impeachment of any other judge presents a political trial requiring a *de novo* review. The Report, then, should have advocated the appropriate changes to expedite the impeachment and removal of judges already convicted of felonies.

In sum, four basic types of alternative proposals are available to solve the current problem concerning the removal of judges. The first is through constitutional amendment, an approach that is politically unrealistic. The second is through historical reinterpretation of the grounds for, and methods by which a federal judge may be removed. These proposals typically focus on the establishment of judicial committees to remove judges; however, as noted above, these methods are both historically and constitutionally unsound. Third, statutory reform has successfully solved a secondary problem of the federal bench, that of disciplining judges for minor infractions, but at the cost of exacerbating the problems of the impeachment process when removal is unquestionably the correct result. Finally, the Kastenmeier Report regrettably adopts a model for impeachments that does not address the steps necessary to reform the impeachment process in a manner that is both fair to the defendant-judge and mindful of Congress' scarce resources.

VI. CONCLUSION

This article began by noting a practical problem in the way impeachments function today: They are too slow and involve enormous allocations of scarce congressional resources to remove a clearly unfit judge from office. This article proposes that the process be expedited for judges who have already been convicted of certain crimes and sentenced to prison. This proposal

automates the process in the House of Representatives, and converts the Senate's role to one designed to explore only whether the convicted judge—given the factual predicate of criminal conviction—should remain in office. The author submits that such a proposal is constitutional and prudent, and solves nearly all of the problems posed by the recent spate of criminal misconduct by federal judges.

An additional public policy consideration undermining the current impeachment process is an increasing lack of public confidence in a system that permits a judge to exhaust his appeals and then forces the Nation to spend resources to impeach him in the House and try him in the Senate—all at public expense while he remains in prison. Two or more years may elapse between conviction and removal. Indeed, since 1984 there has continually been at least one federal judge convicted of a crime yet drawing a salary, still on the bench. These delays must be eliminated before public confidence can be restored to the system. This article's proposal balances the right of the judge to a fair trial and a complete appellate process with the needs of the system to try judges swiftly in the Senate once their criminal conviction is final.